



## **The Case for a Modest Assessment of the International Criminal Justice Processes in Rwanda, Sierra Leone, and Some Lessons for Liberia**

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### **Abstract**

This article seeks to evaluate the role and contributions of the UN International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) to the task of dispensing justice to those most responsible for the commission of international crimes during the Rwandan and Sierra Leonean conflicts. The authors contrast those two situations to that of Liberia, where a Truth and Reconciliation Commission was set up in lieu of criminal accountability. The article argues that part of the unfair criticism of international criminal law is driven by the unrealistic expectation that ad hoc criminal courts such as the ICTR and the SCSL should not only dispense credible justice, but also help to restore peace and promote national reconciliation in deeply divided post-conflict societies. The article posits that even in best case scenarios, such courts can only mete out justice to individual perpetrators of horrific crimes in fair trials that comply with their statutes and international human rights law. An argument is therefore made for a return of these courts to their primary intended roles as criminal courts. Towards that end, the work of the ICTR and the SCSL are tested against eight factors relevant to assessing their achievements and limitations as criminal courts. The article shows that those special tribunals made important contributions to the process of justice for victims of atrocity crimes in Rwanda and Sierra Leone.

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## Résumé

Cet article cherche à évaluer le rôle et les contributions du Tribunal Pénal International des Nations-Unies pour le Rwanda (TPIR) et du Tribunal Spécial pour la Sierra Léone (TSSL) pour remplir la tâche d'administration de la justice à ceux qui sont le plus responsable de perpétration de crimes internationaux durant les conflits rwandais et sierra léonais. Les auteurs contrastent ces deux situations à celle du Libéria, où une Commission Paix et Réconciliation fut mise en place plutôt que la responsabilité criminelle. Nous défendons l'idée qu'une partie des critiques injustes au droit pénal international est tirée par l'attente irréaliste que les tribunaux pénaux ad-hoc tels que le TPIR et le TSSL devraient non seulement administrer une justice crédible, mais aussi aider à restaurer la paix et promouvoir la réconciliation nationale dans les sociétés post-conflit profondément divisées. Nous soumettons l'idée que même dans les scénarios des meilleurs dossiers, de tels tribunaux ne peuvent rendre la justice qu'aux auteurs individuels de crimes atroces dans des procès équitables conformes à leurs statuts et au droit humanitaire international. Dans l'évaluation de leurs héritages, nous appelons en conséquence à un retour leurs rôles premiers attendus en tant que tribunaux pénaux. Dans ce but, nous développons et testons le travail du TPIR et du TSSL à la lumière de huit facteurs pertinents pour évaluer leurs réalisations et limites en tant que tribunaux spéciaux. Nous montrons que même si notre travail n'est pas une étude empirique, il apparaît que ces tribunaux spéciaux ont fait une contribution importante au processus de justice pour les victimes de crimes d'atrocité au Rwanda et en Sierra Léone.

## Introduction

Although by no means unique, the late twentieth and early twenty-first centuries saw a spate of violent conflicts across Africa. These include the horrific genocide in Rwanda in 1994, the brutal civil wars in Liberia and Sierra Leone, and the ongoing conflicts in the Central African Republic (CAR), the Democratic Republic of Congo (DRC) and Uganda. In Rwanda and Sierra Leone, at the request of the national authorities, the 'international community'<sup>1</sup> as represented by the UN sought to establish ad hoc mechanisms through which to prosecute the leading perpetrators of atrocities. Similarly, following in the footsteps of Rwanda and Sierra Leone, the CAR, DRC and Uganda have invited international intervention in their own territories, but not to set up special ad hoc courts. Rather, they referred their own situations to the Prosecutor of the Hague-based permanent International Criminal Court (ICC) in the hope that she will undertake further investigations and prosecutions.

This article seeks to assess the role of the two ad hoc courts, the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL or 'the Special Court'), and their normative impact on the national communities in whose name they were created to render credible justice. It contrasts these two situations to that of Liberia, where a truth commission was established in lieu of criminal accountability. A key lesson we derive from the Rwanda and Sierra Leone accountability experiments is that strong governmental commitment in the affected state is a necessary, if not sufficient, condition in the ongoing fight against impunity.

We proceed as follows. In Part II, in order to manage expectations, we set out the outer parameters of this study. Our argument is that the ad hoc criminal courts for Rwanda and Sierra Leone should be assessed principally on whether they have fulfilled their statutory mandates to hold fair trials. Any other benefits that accrue from their investigations and prosecutions are to be welcomed but should not be treated as a benchmark against which they are evaluated. Having made the case for more realistic grounds for the assessment of the legacy of these courts, we identify eight factors that affected the choice of and consequently the operations of each of the two mechanisms in Part III. In Part IV, we evaluate the ICTR against these criteria and highlight areas of its presumed success as well as highlight some of its core limitations. We do the same in Part V with respect to the SCSL and the Sierra Leone situation. Part VI examines the Liberia experience. Here, the assessment was necessarily brief, partly because that country opted to have a truth commission process as a deliberate policy choice of the parties to the conflict who wished to avoid any criminal prosecutions. This might have been the cost-benefit calculus that made the cessation of hostilities possible. Yet, the truth commission that was later established in Liberia strongly recommended criminal prosecutions on the basis that that it is only after such accountability that the prospects for long-term peace and stability will be strengthened. In a way, though that recommendation has not been taken up by the current government, the question of criminal accountability remains important for Liberia with civil society advocates continuing to call for the creation of a tribunal to prosecute those most responsible for the atrocities committed during the war.

## **Preliminary Issues and Methodology**

As a preliminary matter, it is imperative to define the parameters of this assessment. The ICTR and SCSL differed dramatically in their scope, breadth, budget, funding mechanisms, location, international involvement and novelty. The task at hand is not to assess which flavor of international justice is preferable. Instead, the goal is to assess the strengths and weaknesses

of each mechanism so that an informed decision can be made wherever an ad hoc tribunal becomes necessary in the future. Such a mechanism may become necessary for many reasons, including a failure to act on the part of an unwilling or willing but unable national jurisdiction or, if the concerned state is a party to the Rome Statute, the ICC has not shown a preliminary interest in investigating or prosecuting.

That said, in international criminal law, before the simultaneous establishment of the two, for the first time ever in Sierra Leone, ad hoc international criminal tribunals and truth commissions were traditionally considered as alternatives to each other. The former is generally focused on retribution or deterrence while the latter aims at discerning the truth and creating an accurate historical record with the view to fostering reconciliation. Going beyond this conventional understanding of the general relationship of criminal tribunals to truth commissions, we argue that even amongst temporary international criminal courts which share many goals and similarity in features, it is plausible to conceive of each separate mechanism as a different tool. For one thing, the institutional design of each can vary considerably depending on the specific role envisaged for it and the mandate created by its founding instruments. For another, the given court's contribution to the wider post-conflict dispensation would depend on the presence of other transitional mechanisms and the extent to which those are anticipated to relate or complement its mandate.

It would seem that although as the Africa-based tribunal, the ICTR generally served as the basic blue print for the SCSL,<sup>2</sup> an analogy can probably be made to a hammer which was intended to be used in the fight against impunity in post-genocide Rwanda. This claim derives from the statement of the United Nations Security Council (UNSC) that part of the role of the tribunal was to give retributive justice for the genocide. The SCSL, which had a more limited jurisdictional mandate compared to the ICTR, could be conceptualized as a chisel that was intended to scrape away some of the impunity in the notoriously brutal Sierra Leonean conflict. This claim too can be supported by the resolutions of the Security Council in the lead up to the establishment of the SCSL in collaboration with the government of Sierra Leone. With these analogies in place, one would not ask 'which is a better tool: the hammer or the chisel?' for the simple reason that each tool has a special purpose for which it is suited and any number of other purposes for which it is wholly inappropriate. What's more, the utility and morality of the tasks for which a given tool are suited are independent of a tool's ability to accomplish those tasks. A hammer is equally well-suited to the tasks of building a school for orphans as it is for bludgeoning an innocent victim. The manner in which the tool is wielded, as well as its purpose, greatly changes the equation.

The tasks for which a particular tool is well-suited are necessarily limited. Thus, just as one would not ask whether a hammer is a better tool than a chisel, one would also not ask whether a hammer or a chisel is better at solving complex mathematical equations. The answer is obvious; neither is suited to the task nor are they meant to be used as such. Such grandiose outcomes as restoring peace and security in a post-conflict state are frequently cited as goals for these criminal courts. True, these are important predicates for the criminal justice process to take place. But this paper will only briefly touch on the presumed impact of international criminal justice on peace and security in those countries under consideration, since to our minds, these are arenas that essentially fall outside of their core mandates to prosecute particular crimes in fair trials comporting with the high standards contained in their statutes and customary international human rights law.

That said, whether particular courts can reasonably impact on peace and security assumes that it is, firstly, possible for courts to do so. Secondly, it assumes that these are within the capability of these particular courts. These and other related assumptions may be borne out by experience but in some ways seem problematic. After all, would we expect even the most mature and effective national criminal justice mechanism to decrease youth unemployment, increase agricultural yields or encourage sustainable economic development? While these ends may ultimately be beneficial to a post-conflict state, and can be both a symbol of and a byproduct of peace, stability and security, they are not within the idyllic ambit of even a perfect national criminal justice system. Further, it seems necessary to view our 'tools' in a realistic social, political and economic context. It is simply not worth asking what an international tribunal could do with US\$10 trillion, as that is an unrealistic funding target. Similarly, it is almost guaranteed that *some* constituency, local or international, victim or perpetrator, government or military or civilian, will be displeased with the brand of justice achieved. There is no criminal justice system in the world that has 100 per cent buy-in from its people. An international mechanism is no exception. As international justice mechanisms operate between and among states, with national and international staff, and contemporaneously with other political, economic, and cultural activity and often in complex circumstances after or even during conflict, it appears likewise guaranteed that there will be Iconflict between competing areas of forward progress. Stability is not peace. Peace is not justice. Justice is not prosperity. Prosperity is not stability. However, each can reasonably be said to be bolstered by the presence of the others.

Worse, even in the best of scenarios where we have defined limited expectations, there is some internal tension among the ambitions our 'tools' are intended to achieve.<sup>3</sup> As some scholars have noted with regard to the International Criminal Tribunal for the former Yugoslavia (ICTY), 'depending

on their interests, the [court] may be expected to speak to the desire for victim's justice or guard against the perception of victor's justice. Similarly, the [court] must also prosecute alleged war criminals while simultaneously protecting the accused defendants in the process'.<sup>4</sup> This tension exists not only between local and international stakeholders, but also between the desire for efficient trials and the requirement for fair trials, and between the reasonable impulse to keep costs in control and the necessities of pursuing justice in a post-conflict society.

Lastly, the goal of assessing the efficacy of the tribunals as legal institutions is distinct from the task of assessing the impact they have had on the peace, reconciliation and security in a given country. As Janine Clark has persuasively argued, an accurate assessment of whether an international justice mechanism has contributed to the restoration and maintenance of peace in a post-conflict society requires a thorough empirical study of on-the-ground conditions and the attitudes of the mechanisms' various constituencies.<sup>5</sup> This is not such a study, and we do not purport to evaluate the experiences of those affected by the conflicts in Rwanda, Sierra Leone, or Liberia, nor their individual or overarching perception of the justice delivered by these mechanisms. Justice 'is a matter of both actions and the perceptions that they create'.<sup>6</sup> A failing beyond the scope of a tribunal's mandate may greatly undermine even the best of criminal processes.<sup>7</sup> Moreover, delivering on some of a tribunal's goals (such as due process rights and humane sentencing) may run counter to other goals (such as reconciliation and local buy-in). Thus a thorough understanding of the justice achieved by the mechanisms would require an empirical study of those affected by the processes and a study of the actions undertaken by and in service to those processes. The latter category is where we focus our efforts.

Our aimed contribution to the literature is essentially three-fold. First, we seek to join a handful of scholarly works that are increasingly beginning to call for more realism in the expectations thrust upon international criminal courts, and even more broadly perhaps, the use of the criminal law tool and its potential and limitations to contribute to stabilizing conflict and post-conflict societies. Second, by developing preliminary factors to help in what appears to be the early literature on the assessment of the 'legacy' of these courts, we will hopefully help spur further scholarly conversations on what ought to be the criteria for the review of their primary contributions. Lastly, we seek to turn the scope on to the Africa-based tribunals even as we seek to mine their lessons and show the relevance of those experiences for other African situations. While each African conflict situation may be unique in its own way, we maintain that each African state facing questions of how best to operationalize criminal accountability for international crimes must not fail to learn from the lessons of history from other countries with similar experiences nearby. All the more

so considering that all those African states have often to operate in a world in which some countries are better positioned than others to drive the global accountability agenda.

### **Factors used in Assessing Impact**

As discussed above, the methodology of this paper will be to normatively assess the ICTR and the SCSL on eight different criteria relevant to their creation, their work, and their effect on the local community. These are initial criteria aimed at identifying the legal impact of the tribunals, and in that sense, we do not aim to provide a comprehensive view of all frames or lens through which to view the courts, their legacies, and their impact. The factors below, while not definitive, are among the important ones for the purposes of analysing criminal courts in so far as questions about them tend to recur across many post-conflict situations where individual criminal accountability has come in issue on the continent. There is certainly great room for other scholars to consider the psychological, openly political, sociological or economic and other impacts of these mechanisms.

### ***Local Involvement in the International Instrument***

A primary factor to consider in assessing the international mechanisms is the degree of local involvement in the formation, organization, conduct, and decisions of the tribunal in question. This factor has both principled and practical implications.

The principle that war crimes and crimes against humanity should not go unpunished seems to be, at this point in history, widely accepted by all nations. In this sense, the desire to try perpetrators should be shared by both the putative international community and the state in question. The two are not in opposition, and often, the wishes of both the local and the international actors coincide with and complement each other. This helps to create a sense of a common goal to work towards. The desire and necessity of punishing perpetrators is just as much a local concern as it is an imposition of international high-mindedness from abroad.

From a practical standpoint, the evidence, witnesses, and often the accused, will be in the *locus commisi delicti* – the place where the crime was committed. A court, whether local, wholly international or internationalized, relies on the local community and its government to collect information and capture perpetrators. Thus, the degree to which the court is successful depends considerably on the cooperation of the local institutions. It is obvious that a court that attempts to function without witnesses, physical evidence, or a defendant will have a rough ride of it, indeed. As such, local involvement,

both at the level of the formal institutions of the state and outside of them in civil society and amongst individuals, has a very important practical impact on the conduct of the work of the penal tribunal.

Further, inasmuch as it can be argued that one goal of international criminal justice is to bolster the reconstruction of post-conflict states and regions, it is necessary to assess the degree to which the affected population endorses the work of the court. However, local *involvement* in the tribunal and local *approval* of the court's work are separate and distinct things.<sup>8</sup> The former can be assessed using benchmarks such as participation in terms of numbers of local prosecutors, judges and defence counsel and other staff. The latter can be affected by both the perceptions of the tribunal's work and the extent of local involvement and local input, but it is ultimately a separate issue altogether. For instance, an authoritative study of the ICTY found that members of the affected populations (including Serbs, Bosnians, and Croats) in Bosnia held a wide variety of views about the Tribunal.<sup>9</sup> This, in one way, may not be that surprising. Many locals interviewed for the study took issue with the length of specific sentences,<sup>10</sup> the pace of the trials,<sup>11</sup> and the use of plea bargains in lieu of trials.<sup>12</sup> Although the respondents may not have approved of all of the actions of the court, the local populace was certainly involved in – at least sufficiently to form opinions about – the work of the ICTY.

### ***Competing National Proceedings***

It has been a given, going back to the first such prosecutions after World War II, that it is not possible for international justice to act as a replacement for national justice. At best international prosecutions are supplements to domestic prosecutions. For this reason, all international and internationalized courts have had a limited mandate to prosecute a certain class of crimes or actors. A system for selecting individuals that will be brought to account in the international forum is therefore inevitable with the first such experience at Nuremberg explicitly limited to the 'major' Nazi personalities behind the war. However, depending on the scale of the conflict, the commission of atrocities will involve dozens, if not hundreds or thousands and sometimes tens of thousands of actual perpetrators. Crimes associated with those within the ambit of the international court's personal jurisdiction, as well as others not within it, must be dealt with by local authorities in one way or another. As such, the degree to which the local authorities seek other avenues of redress, and the character of those efforts, inform the perceptions that will be generated about the efficacy of the international court. In other words, the inevitable division of labour between the national jurisdiction and the international(ized) jurisdiction has an impact on the perception of either and often both of the entities in question.



### *Competing International Proceedings*

Similarly, the efforts of other international organizations or third-party states to bring perpetrators to justice implicate the actual and presumed efficacy of an international criminal justice mechanism. For example, some countries might invoke universal jurisdiction, passive personality or other permissible grounds of jurisdiction to prosecute offenders who have fled to their territories, as a number of countries such as Belgium, Canada and France have done with respect to alleged *genocidaires* from Rwanda.<sup>13</sup> On the one hand, such national level efforts that complement the court's work will allow the tribunal to focus on fulfilling its mandate. On the other, efforts that overlap with the tribunal's work may raise questions of jurisdictional conflict and primacy or even be a reflection of a lack of broader support for the court.

### *Impunity and 'Victor's Justice'*

A common concern since the establishment of the International Military Tribunals (IMTs) after World War II has been that the victor in a conflict will subject the vanquished to the victor's preferred justice. The choice to forego outright execution of the enemy leaders and instead subject them to criminal trials in a court of law was a step forward in 1945, even if the practical consequence were the same for the convicted. Pragmatically, it is unlikely in the context of a widespread violent conflict that atrocities and violations of international law are limited to one side. Yet, in 1946 this meant that the Allies could choose to conveniently ignore the crimes that their own forces committed in favor of prosecuting twenty-two Nazi leaders and their associates. Therefore, in this wider morally fraught context in which no victorious power will set up a court to prosecute itself instead of only its enemies, the firebombing of civilians in Dresden or the use of atomic weapons against the Japanese in Nagasaki and Hiroshima could be recast as unfortunate consequences of Axis aggression but not prosecutable war crimes or crimes against humanity. The hypocrisy that results is self-evident and deeply problematic.

In the modern context, the reality of the victor's power to decide what will happen to the loser remains. Much as in the past, the parties that ultimately come to control the government of a post-conflict nation are likely to have had *some* hand in the conflict. Yet, as Victor Peskin has argued, '[a] corollary to [the principle of the universality of human rights] is that all victims of human rights abuses deserve justice regardless of which side they belong to. [...] There is no moral basis for immunizing victorious nations from scrutiny'.<sup>14</sup> In this vein, in modern African conflicts and other transitions, the concern will arise as to whether the international criminal justice mechanism created

to prosecute atrocities will privilege and effectively insulate the victors from criminal process, much like the Allies ensured at Nuremberg. On the other hand, and we pursue this admittedly controversial line of thought further below, it may be – even if this at first blush seems counter-intuitive – that victor's justice is not only practically inevitable but that in some cases it may also be practically desirable.

### ***Breadth of Proceedings***

If we mean to assess a court's success, we must necessarily examine what the Court set out to accomplish. Of course, in the international criminal law area, there is no shortage of ambitions for these courts. Some of these ambitions are more consistent with the central mission of the tribunal as a criminal court while others are a bit more distant from it. We might, to have a useful conversation, seek to separate out the primary from the secondary goals and justifiably limit our assessment to those that are primary responsibilities of a criminal court: to render fair trials in accordance with the law.<sup>15</sup> For instance, it would be no failure of justice if a Nigerian court fails to prosecute a common criminal in Lesotho; that is not the Nigerian court's role. Similarly, we should consider the success of an ad hoc court within the context of its core mission and core purpose.<sup>16</sup>

The most fundamental statement of a court's intended purpose is its mandate. In the international context, some specific statute or instrument, or a set of instruments, must describe the jurisdiction. This sets out the framework for how the court is to be run, what rules will apply, and most importantly, what kinds of crimes, committed where, when and by whom, the court is empowered to adjudicate. The ICTR and SCSL differ dramatically in this regard, as discussed below, as do those two Chapter VII courts from the permanent ICC.

A corollary to the court's explicit mandate is the number of trials the tribunal actually carries out. This has a nexus to the mandate in the sense that the manner in which the jurisdiction is framed can narrow or widen the field of prosecutorial charging decisions. The terms 'greatest responsibility'<sup>17</sup> and 'most responsible'<sup>18</sup> are now becoming terms of art, suggesting a move away from a 'persons responsible' standard that appeared to apply in the heyday of international criminal courts.<sup>19</sup> Not only does the form of personal jurisdiction relate directly to the expected throughput of the court, they serve to either cabin or widen the prosecutorial mandate and ultimately influence the exercise of discretion in a given direction. These, in turn, affect the breadth or quantity of justice that is served. Those in turn impact on the perception of the justice that was rendered.

### *Quality of Proceedings*

It should go without saying that a properly constituted justice mechanism seeks to ensure the highest quality legal proceedings. This is especially so with international criminal justice mechanisms, where a supplementary legal entity is created often out of concern for the poor condition of the default national mechanism. The so-called ‘international standards’ that come into play in international criminal tribunals are therefore not necessarily always compatible with the standards in every local jurisdiction. They are not simply the subset of rules to which all international parties agree. Rather, they are often aspirational rules that aim to ensure a fair trial for the accused, just punishment, and a sufficient quantum of evidence to encourage faith in the process.

Given that international courts are set up with a goal of meeting international standards, they should be judged against that metric and not necessarily the standards of the local jurisdiction. Again, disagreement on these norms is not limited to the African context. Most American states, for instance, continue to provide for different rules on provision of grand juries or capital punishment even though most other countries or international criminal justice do not. It would be patently unfair to criticize an international court for failing to apply American standards of punishment over the objections of American legislators.

A high-quality proceeding is not simply one that delivers the desired outcome (and, indeed, an impartial court should not prefer a specific outcome). It is equally true that an undesirable outcome is not the indicia of a low-quality proceeding. In both cases, the degree to which the proceedings complied with international standards for fair trial are wholly independent of the outcome in an individual case for the simple reason that the parties, constituencies and observers often have differing views of which outcome is most desirable. Again, an empirical study of the perceptions of quality in the affected populations would yield valuable insight for future tribunals, but would not necessarily speak to the question of whether the proceedings did, in fact, comport with international fair trial norms.

### *Administering Cost*

There is, literally, a cost to international justice. It therefore seems fair to assess the cost of a particular implementation thereof. Again, the SCSL and the ICTR differed dramatically in this respect. A few different ways can be used to consider the cost of an international court. First, and most obvious, is the total amount of money spent by all parties (the total cost of

the tribunal). Second is the cost per trial, per defendant, per situation, or otherwise reduced by a normalizing factor to facilitate comparison with other institutions. Third, we can consider the funding mechanism that provides money for the court's operation as it may greatly affect the way the tribunal does its work. Lastly, and least importantly perhaps, is the relative cost of courts vis-à-vis other national priorities. The latter issue may seem distant, but in many post-conflict contexts, the very existence of the criminal tribunals and international involvement appears to have invited parallel comparison – a cost-benefit analysis of whether the funds provided could have been better spent elsewhere. This is to be expected, considering that in many of those societies, international involvement comes about because of the failure of the national system in provisioning the relevant sectors of society adequately. Poverty and lack of resources may, in a world of finite resources, give rise to legitimate questions about what area must be given priority.

It is often said that the ICTR and ICTY were 'expensive',<sup>20</sup> and that the SCSL was set up as a cheaper alternative in the wake of 'tribunal fatigue'<sup>21</sup> within the international community. True as that may be, neither the ICTY and ICTR spent what could be deemed an internationally significant amount of money when compared to the amounts that nations spend on warplanes, or what some developed countries spend on snack food, elective surgery or movie tickets. On the other hand, one may rightly ask if the money spent on international criminal justice mechanisms would not have been better spent on food aid, capacity building, economic development or other beneficial endeavours. This seems a fair question, but one that confused the hammer for the super-computer. We submit that there is more than enough money to fund *both* international criminal justice and development efforts without seriously affecting the international community's bottom line. That being said, the existence of that money, the question of political will and the ability to convince states of the importance of these expenditures are separate questions beyond the scope of this article. Ultimately, it may be that in more ways than one, the work of international tribunals appear to follow the adage of project management 'fast, cheap and good: pick two'.

### ***Jurisprudential Impact***

One of the benefits of the push in the late twentieth and early twenty-first centuries to establish norms of international criminal law is that newly constituted tribunals will not need to reinvent the wheel. With that in mind, the degree to which a court contributed to the goal of establishing this groundwork is often seen as relevant to assessing its legacy and efficacy as a legal institution. It is acknowledged that not all parties will agree on

the accuracy or utility of any particular tribunal's contribution to the state of international criminal law.

Having identified the above factors, in what follows below, we apply each of the above criterium to the situations in Rwanda, Sierra Leone and Liberia.

## Rwanda

### *Background to the Genocide*

Rwanda was colonized by both Germany and Belgium, the latter of which introduced a formal system of racial classification by separating the Rwandese population into three groups: the Hutu (roughly 84 % of the population), the Tutsi (about 15 %) and the Twa (the remaining 1 %).<sup>22</sup> Broadly speaking, at the risk of oversimplification, the minority Tutsi population was favoured by the colonial authorities over the majority Hutu. The Tutsi remained in positions of leadership until the UN Trusteeship-mandated universal elections in 1956, at which time the Hutus ushered in a Hutu-majority government and an era of civil unrest between ethnic groups.<sup>23</sup> Violence occasionally followed, with several targeted attacks against the minority Tutsis. After each attack, some Tutsis would flee the country. Some would end up in neighbouring states as refugees. Rwandan Tutsi exiles in Uganda formed the Alliance Rwandaise pour l'Unité Nationale (ARUN) in 1979, and later renamed themselves the Rwandan Patriotic Front (RPF).<sup>24</sup>

An attack from Uganda by the RPF into Rwanda on 1 October 1990 began a three-year conflict between the RPF and the Rwandese Armed Forces led by then-President Juvenal Habyarimana. The war was nominally ended by the Arusha Accords, a 1993 power-sharing agreement between the RPF and the Rwandese Government which provided for, *inter alia*, a transitional government that included the rebels, demobilization and integration of the armies, and deployment of a UN peace-keeping force in Rwanda (what later came to be known as the United Nations Assistance Mission for Rwanda – UNAMIR).<sup>25</sup>

Efforts to establish the transitional government led to a meeting in Dar es Salaam on 6 April 1994 that included President Habyarimana, President Ntaryamira of Burundi, and other regional heads of state. The plane carrying Habyarimana and Ntaryamira crashed outside of the Kigali airport as it returned from the meeting around 8:30 p.m. on the night of 6 April 1994.<sup>26</sup> The government forces quickly blocked off entire areas of Kigali, and members of the Rwandan Army and the Presidential Guard began systematically killing moderates and other known prominent supporters of the Arusha Accords. Among these initial targets of the violence were Prime Minister Agathe

Uwilingiyimana (MDR), a Hutu moderate politician, the president of the Supreme Court and virtually the entire leadership of the *parti social démocratie* (PSD).<sup>27</sup> This resulted in a constitutional power vacuum that was quickly filled by an avowedly pro-Hutu interim government made of extremists and led by Jean Kambanda.

Using the army and special battalions, as well as militia groups called *Interahamwe* and *Impuzamugambi*, a cadre of dedicated Hutu Power proponents led a series of genocidal attacks on Tutsi and moderate Hutu civilians throughout the country. Although UNAMIR forces were present in the country, their mandate was not extended to the protection of civilians, despite repeated calls for such by the UN Force Commander General Rome Dallaire.<sup>28</sup> Instead, following the killing of ten Belgian paratroopers, the UN peacekeeping mission was downgraded.<sup>29</sup> No other countries intervened, from Africa or elsewhere, giving sufficient space for the genocidal bloodbath to occur.<sup>30</sup> Over a period of 100 days, between 7 April 1994 and 18 July 1994, between 500,000 and 1 million Tutsis and moderate Hutus were killed in Rwanda.<sup>31</sup> The killings continued until the RPF, led by General Paul Kagame, captured the capital, Kigali, on 18 July 1994. Kagame was to later become Rwanda's president.

### ***Local Involvement***

Rwanda moved for UN support to create a tribunal to prosecute those who perpetrated the genocide. Yet, due to its dissatisfaction with a number of issues as discussed further below, it was the only government that ultimately voted against it. The ICTR was established by a resolution of the UNSC, and thus did not rely on formal consent from Rwanda.<sup>32</sup> In the simplest sense, though this was not inevitable, the creation of the Tribunal did not have the same level of local involvement as did the SCSL. Relying on the Security Council's broad powers to 'maintain or restore international peace and security'<sup>33</sup> under Chapter VII of the UN Charter, the Tribunal, its mandate, and its governing statute were creations of the broader international community as represented by the UN.

Having voted against it in the Security Council, Rwanda's relationship with the Tribunal was predictably troubled from the start. Within a week of the beginning of the mass killings, the representative of the RPF informed the President of the Security Council that genocide was being committed in Rwanda and requested Security Council action.<sup>34</sup> A few months later, on 8 June 1994, the Security Council adopted Resolution 925, which noted 'with gravest concern the reports indicating that acts of genocide have occurred in Rwanda and recalling in this context that genocide constitutes a crime punishable under international law'.<sup>35</sup> A panel of experts convened by the

Secretary-General at the behest of the Security Council recommended, *inter alia*, that the Security Council 'take all necessary and effective action to ensure that the individuals responsible for the serious violations of human rights in Rwanda... are brought to justice before an independent and impartial international criminal tribunal'.<sup>36</sup>

However, Rwanda's enthusiasm for the idea of an international tribunal faltered on the shoals of implementation. The Rwandese government, as a rotating member of the Security Council at the time, was an active participant in the negotiation of the Statute of the Tribunal. Throughout the negotiations, Rwanda indicated serious misgivings about the form the Tribunal was taking. Evidently, its concerns were not addressed, an ominous sign of what was to come later. Ultimately, Resolution 955 passed over the objections of the Rwandese government.<sup>37</sup>

Rwanda expressed seven primary points of concern over the form and substance of the Tribunal.<sup>38</sup> First, Rwanda objected to the limited temporal jurisdiction of the Tribunal because, in its view, the genocide that erupted in April of 1994 was the result of a long period of planning and 'pilot projects' that long predated the ICTR's limits.<sup>39</sup> Second, the Rwandese government believed that the Tribunal as initially constituted lacked sufficient trial judges to fulfil its mandate. Rwanda's delegate suggested that 'the establishment of so ineffective an international tribunal would only appease the conscience of the international community rather than respond to the expectations of the Rwandese people and the victims of the genocide'.<sup>40</sup> Third, the government was concerned that the Tribunal would expend its resources prosecuting crimes that were within the jurisdiction of national courts to the exclusion of the international crimes within its own jurisdiction.<sup>41</sup> Fourth, the government rejected some proposed judicial candidates who they believed had taken 'a very active part in the civil war in Rwanda'.<sup>42</sup> Fifth, the Rwandese Government felt that it was inappropriate that those convicted by the Tribunal should be imprisoned outside of Rwanda in accordance with the host country's laws.<sup>43</sup> Rwandan authorities argued that this would encourage countries inclined to free any convicted *genocidaires* to vie for the imprisonment assignments.<sup>44</sup> Sixth, the Rwandese delegation opposed the abolition of capital punishment in the Statute because of the possibility that those most responsible for the genocide would receive lighter treatment than those tried in Rwandan courts where capital punishment was legal.<sup>45</sup> Finally, the Rwandese government disagreed with the decision to locate the Tribunal outside the country rather than in Rwanda itself. The government rightly argued that locating the court in Rwanda would serve to 'fight against the impunity to which [the Rwandese people] have become accustomed ... and to promote the harmonization of



international and national jurisprudence'.<sup>46</sup> In many ways, some of these initial objections reflect typical concerns about sovereignty and a desire to influence if not assert a measure of control over the eventual mechanism that was being considered in the name of The people of Rwanda. With the benefit of hindsight, it seems that some of those concerns lacked merit while others proved to have some merit.

Though there were periods of smooth cooperation, especially with specific organs such as with the ICTR Office of the Prosecutor and the Registry, the overall on-off relationship between the ICTR and the Rwandese government continued to be a challenge throughout the life of the Tribunal. This culminated in several high-profile conflicts, including standoffs over the ICTR's primacy in the extradition of Theoneste Bagosora and Foduald Karamira. Perhaps the most significant conflict, however, came in the case of Jean-Bosco Barayagwiza, who was accused of fomenting anti-Tutsi violence through his role in the Ministry of Foreign Affairs.<sup>47</sup> Finding that Barayagwiza's case had been marred by serious due process concerns, the Appeals Chamber dismissed the indictment with prejudice against the prosecution and ordered his unconditional release in November of 1999.<sup>48</sup> The Rwandese government responded by publicly declaring its intention to withhold cooperation with the Tribunal until the Appeals Chamber decision had been reversed. Eventually, the decision was reversed by the Appeals Chamber (citing 'new facts'), and the cooperation between Rwanda and the Tribunal resumed.<sup>49</sup> Through this refusal to cooperate, and the subsequent Appeals Chamber decision that aligned with the Rwandese government's position, '[t]he government showed that it could effectively hold witnesses hostage and virtually bring the wheels of justice to a halt'.<sup>50</sup> This tactic raises legitimate questions about the efficacy of the international regime especially given the state-centric nature of that system under which little if any action is possible without the support of the concerned state.<sup>51</sup> For this reason, without state cooperation, international criminal tribunals are unable to do any concrete work to achieve their mandates.<sup>52</sup>

After the active trials at the ICTR concluded, the Rwandese Minister of Justice confirmed that the national feelings of disassociation had continued through the end of the Tribunal's work. Minister Tharcisse Karugarama told the UN General Assembly that 'international justice is in a crisis of credibility with regard to fostering national reconciliation in post-conflict situations', that international courts are 'viewed as foreign, detached and contribute very little to National reconciliation process', and that the objective of fostering national reconciliation and restoring peace in Rwanda had not been achieved.<sup>53</sup>

With that history in mind, it seems clear that the ICTR did not excel in the area of local involvement. There was no formal role for the government in



the work of the ICTR such as appointing key staff, as there was at the SCSL.<sup>54</sup> Another problem is that the Tribunal missed opportunities to connect with Rwandans, with limited outreach to the country especially in the early years. The political and logistical conflicts between the Tribunal and Rwandese national institutions caused considerable difficulty during the court's tenure, and undermined each party's confidence in the other as a partner in achieving justice. As Minister Karugarama's statements at the UN indicate, the feeling that the Tribunal was not sufficiently focused on local needs, expressed by the Rwandese delegation during the negotiation of Resolution 955, continues to hold sway in official Rwandese circles. If this is the official position, it would seem unlikely that the ICTR would fare any better in assessments among the local population in the country.

On a related note, it is difficult to secure a statistical breakdown of the Tribunal's staff composition. But, the apparent absence of meaningful participation by Rwandans in the court's processes did not help bridge the physical and emotional gaps between the Tribunal and the national authorities. Based on one of these author's experience working in the judicial chambers of the tribunal as a legal officer, it was rather noticeable that there were hardly any Rwandese prosecutors in the ICTR, let alone judges or attorneys serving in other capacities. True, a handful were recruited at various stages of the process. But the numbers were so negligible that it smacked of tokenism. The reality is that the bulk of the prosecutors were from elsewhere, reflecting the UN-origins of the Tribunal. Of the Rwandans there, few were senior trial attorneys leading teams or holding other senior positions. This implied that, whether deliberately or inadvertently, there was very little space created for or left in the Tribunal for nationals of the country most affected by the genocide. This was unfortunate for many reasons, not least that there was a failure to take advantage of their expertise and experiences with genocide to leave a legacy that could be useful to the national justice system (assuming those individuals returned home to serve after the work of the ICTR concluded). The involvement of professionals with connections to the country might have served to increase local buy-in by carving out a role as informal ambassadors to disseminate information about the trials back in their home country. It seemed, in any event, that the bulk of those from Rwanda walking the hallways in Arusha were attorneys or investigators on the defence side, interpreters or witness management officers. Those were important roles, but they were hardly enough.

### *Competing National Proceedings*

While the ICTR was tasked with trying those most responsible for the 1994 genocide, the Rwandese national authorities were responsible for prosecuting

the vast majority of perpetrators in the national courts. This informal division of labour, between the tribunal and the domestic justice system, is a common and indeed inevitable feature of international criminal law. Some of the suspects and accused would of course have fallen within the jurisdiction of the ICTR. The remaining suspects would likely not have risen to the level of international humanitarian law violations, and where they did, might not have been sufficiently high level to attract the ICTR's interest. This scenario is of course not unique to Rwanda; rather, all post-conflict societies can expect that the overwhelming majority of individual perpetrators would not be part of any international or internationalized prosecutions. The scope of such tribunals has, from Nuremberg to Arusha to Freetown to The Hague, been limited to higher ranking offenders.<sup>55</sup>

Thus, at the end of the day, the national institutions are given the more difficult task of ensuring justice is meted out to the bulk of the perpetrators. In Rwanda, after some experimentation, two principal methods were used to prosecute alleged suspects. First, the national judiciary established specialized tribunals of first instance to deal with the accused *genocidaires*. The national legal framework has been substantially modified since such trials started in 1996, including substantial moves toward an Anglo-American system of precedential decisions<sup>56</sup> and abolition of the death penalty in 2007. The national judiciary has handled roughly 15,000 cases over seventeen years at a cost of US\$ 17,000,000.<sup>57</sup> Second, and more significantly, was the establishment of *gacaca* courts that acted at the local level independent of the formal courts. These community courts were created with the express purpose of incorporating local, traditional understandings of justice into a modern justice framework. In this sense, the *gacaca* courts were an alternative both to formal criminal justice proceedings and non-retributive reconciliation methods such as truth and reconciliation commissions.<sup>58</sup>

*Gacaca* courts met weekly in each of the roughly 9,000 cellules and 1,500 sectors within Rwanda.<sup>59</sup> First, people in the community were encouraged to describe their experiences during the genocide as a way of collecting evidence against possible accused persons. Then, a trial phase has the accused questioned by judges and community members about their actions in 1994. Judgements were then rendered by a panel of judges drawn from the same broader community as the accused. Through this process, Rwanda has been able to handle nearly two million cases in ten years at a cost of roughly US\$ 52,000,000.<sup>60</sup>

We hesitate to judge community trials like *gacaca*, which were effectively conceived as a way to address the unprecedented crisis situation that Rwanda faced at the time, against formal justice processes with all their due process

guarantees under the Rwandan constitution and international human rights law. Part of the reason is that regular criminal trials, let alone genocide trials, are hardly comparable to informal local community gatherings on the grass to talk about who did what to whom during a traumatic event; it is an apples-to-seahorses comparison. Second, that system by its very nature operates outside of the formal court system. It consequently would not likely comply nor purport to comply with the stringent demands we might expect of a formal criminal justice system. Yet, precisely because the choice to pursue *gacaca* effectively circumvents the government's obligations to comport itself with its constitutional, African and international human rights guarantees to its citizens, several observations are inevitable. All the more so given that the traditional *gacaca* approach has – as might be expected – both positive and negative elements that are worthy of consideration in future post-conflict scenarios.

On the one hand, the visibility, local sensitivity and efficiency of these proceedings can be framed as effective counterweights to the perceived isolation, slow pace and expense of the ICTR. On the other hand, this efficiency, and to some degree the emphasis on local community concerns, seem to apparently come at the expense of fair trial standards for individuals alleged to have been involved with the genocide. *Gacaca* courts are not courts of law per se, and their status as community courts creates the possibility of undue influence, double jeopardy, and even reversal of the burden of proof.<sup>61</sup> Further, decisions of the *gacaca* courts could only be appealed to the sector's appellate *gacaca* court, and thus decisions rendered in local communities were not reviewable by the national judiciary.<sup>62</sup>

### ***Competing International Proceedings***

As a creation of the UN Security Council, the ICTR relied mainly on the strength of the international community to support its core mission. Although that mission included the trial of those most responsible for the 1994 genocide, several domestic judiciaries conducted trials of Rwandan suspects that were likely within the ambit of the Tribunal. These domestic proceedings came about and garnered more political support as more countries internalized the anti-genocide norm at the national level. It could not have been timelier given David Scheffers's 'tribunal fatigue'<sup>63</sup> in the Security Council following years of expensive trials at the ICTR and the ICTY. Inasmuch as the work of the ICTR relied on the support of domestic authorities to dispose of cases involving middle to high ranking offenders, the decision to try these perpetrators outside of the Tribunal system, and the ICTR's acquiescence to such arrangements, indicates that 'tribunal fatigue' was an operative concern.<sup>64</sup>

Several countries tried suspected Rwandan *genocidaires* in their national systems during the operation of the ICTR. These cases mainly proceeded under the theory of universal jurisdiction, whereby states that do not have a nexus to the conflict, the victim or the accused could nonetheless try grave violations of international law.<sup>65</sup> National courts that tried suspects whose crimes were directly within the jurisdictional ambit of the ICTR have included Canada,<sup>66</sup> Germany,<sup>67</sup> Great Britain,<sup>68</sup> Belgium,<sup>69</sup> Norway,<sup>70</sup> and France.<sup>71</sup> It is notable here that, despite allegations of harbouring several high level Rwandese fugitives from justice by countries such as Zaire, DRC and Zambia, no African states have ever asserted universal jurisdiction to pursue prosecutions of the alleged *genocidaires* within their midst.<sup>72</sup> Save for a few instances, it is not entirely clear that these same individuals tried in foreign national courts would have been tried by the ICTR, especially in the latter stages of the court's life when the Completion Strategy appeared to have taken hold. Still, it can be concluded that the prosecutions by the mostly European countries mentioned may have played a useful role in the operation of the ICTR. The difficulty is that, where there were high level perpetrators involved, a separate question arises as to the motivations for the prosecutions. They were not always benign. For example, in some of the cases involving France, the Kagame regime has argued more sinister motives might have been behind the push for domestic trials instead of voluntary transfer of all their accused to the Tribunal.<sup>73</sup>

### *Impunity and 'Victor's Justice'*

Like the Nuremberg and Tokyo Tribunals, the ICTR has had a mixed record with regard to both impunity and victor's justice. Focusing on positive contributions, the list of the accused before the Tribunal shows that a wide variety of actions were considered by the Prosecutor to have contributed to the genocide. Thus, the Tribunal has investigated and punished senior military officials, cabinet members of the civilian government, politicians, religious leaders and media figures on genocide or genocide-related charges.<sup>74</sup> This view of the Tribunal's mandate to try those most responsible shows an acute understanding that organized violence on this scale does not arise solely through physical force.<sup>75</sup> Accordingly, the Tribunal removed the cloak of impunity, exposing most of the ring-leaders in the public and the private spheres to some measure of accountability. Conversely, as always, there is another side to the story. Much of the subsequent violence in the Great Lakes Region, including in the DRC and the CAR, have some connection to the Rwandan conflict. It can be argued that to the degree that the ICTR was unable to prevent participation in these neighbouring conflicts by those who came within its jurisdiction is a strike against its war on impunity.<sup>76</sup> Yet,

such an argument would need more to avoid being simplistic. For one thing, even though there seems to be a broad connection, it is not entirely clear, based on the publicly available evidence, that the same leaders from Rwanda are the ones heading the activities of the militia and other fighters in those neighbouring states. In this vein, and in any event, there is of course ICC involvement in prosecuting crimes from that region.<sup>77</sup>

But perhaps the biggest critique of the ICTR seems to be the claims by some human rights groups and academics that it has only dispensed 'victor's justice'.<sup>78</sup> This argument, made most forcefully by Human Rights Watch, echoes the experience of Nuremberg and apparently attempts to over correct for it. It is predicated on the simplest and perhaps noblest of ideas that justice has to be dispensed equally and to all sides involved in a given conflict. Notably, none of those tried at the ICTR came from the Rwandan Patriotic Front (RPF) camp.<sup>79</sup> Of course, the leader of the RPF, Paul Kagame, became the head of the post-genocide government of Rwanda, and remains in that post today. Allegedly, the attempts by then-Prosecutor Carla Del Ponte to bring charges against RPF leaders and commanders in 2002 preceded a political standoff that ended in the bifurcation of the Office of the Prosecutor at the ICTR and the ICTY.<sup>80</sup> Although the then Secretary General Kofi Annan stated that the creation of separate prosecutor's offices was intended to increase efficiency and mitigate administrative concerns, '[t]he timing of the plan, in the face of intense Rwandan pressure, leaves the Security Council open to the charge that it sacrificed Del Ponte to appease Rwanda's anger and, perhaps, to stop the tribunal from issuing RPF indictments'.<sup>81</sup>

With due respect, this appears to be a rather tenuous argument. For one thing, it buys into Del Ponte's broader claim that she was removed from her post because she crossed the red line that the Kagame Government had drawn for her. Yet, it should be apparent that Madam Del Ponte was aggrieved, and having lost her job, may have been seeking an explanation to make sense of her situation. She is not exactly the most neutral person to make this claim. Furthermore, since Peskin's article was written, more information has emerged in the public domain suggesting that the non-renewal of Del Ponte's contract may have been, at least in part, for less sinister reasons.<sup>82</sup> This undermines the former prosecutor's arguments and has led William Schabas, a leading scholar, to clarify that the decision may have had to do more with other factors than her desire to seek indictments against the RPF leadership for alleged crimes committed in 1994.<sup>83</sup>

In fact, going even further, there may well be explanations for a decision to not indict the RPF personnel that are less dramatic and perhaps even benign. According to the first Prosecutor of the ICTY and the ICTR, Richard

Goldstone, the decision not to indict RPF crimes can be rationalized as a matter of prosecutorial policy.<sup>84</sup> This position was based on his professional assessment as an independent prosecutor. Thus, in Goldstone's view, the 'Hutu crimes' ranked as a nine or ten while the 'Tutsi crimes' ranked much lower. He, like many other national and international prosecutors, was faced with a difficult choice of which of many incidents to focus on in light of pragmatic constraints. 'We didn't have enough resources to investigate all the nines and tens [a]nd the RPF, who acted in revenge, were at ones and twos and maybe even fours and fives.'<sup>85</sup> Looked at in this way, the fact that the indictments did not include any RPF members could reasonably be construed as a function of the relative gravity of the crimes at issue, not a political or retributive decision, as Del Ponte and her supporters are inclined to suggest.<sup>86</sup> Ultimately, for whatever reason, whether political, security or simply practical, the ICTR never filed any formal charges against alleged perpetrators of crimes committed by the RPF.

The ICTR Prosecutor has identified at least one incident in which several Hutu clergymen were killed under circumstances suggesting the perpetration of war crimes, but Rwanda moved to prosecute those individuals in its domestic justice system. The Prosecutor of the ICTR, in light of that decision, stepped back and let the natural forum pursue the few perpetrators involved. As he reported to the Security Council, in June 2008, he was clear to the Prosecutor General of Rwanda that 'any such prosecutions in and by Rwanda should be effective, expeditious, fair and open to the public'. Furthermore, his office undertook to 'monitor those proceedings', and if they were not satisfactory, he would invoke the primacy of the ICTR over those crimes.<sup>87</sup>

Between June and October 2008, Rwanda carried out the trial of four senior military officers and, as the ICTR did not have issues with the trial, the Prosecutor declared the matter closed from his perspective.<sup>88</sup> That trial has predictably been subject to criticism from both NGOs and scholars.<sup>89</sup> All to say, even though there was seemingly credible evidence supporting investigation of those crimes,<sup>90</sup> the ICTR's decision not to pursue them will continue to be a contentious point. The goal here is not to resolve that debate. Rather, it is sufficient for our purposes to note that Kagame's twenty year reign as president has also given some credence to the charge that the ICTR did not dispense blind justice during its tenure.

In the end, despite its alleged merits given the principle of equality of all persons (including victims) before the law, it seems rather simplistic to reduce a years- long socio-economic-military conflict to 'sides', and worse, to equate the criminal responsibility of the victims of the genocide to those who tried to wipe them out. At least at a moral level, the argument comes off as deeply

problematic if not downright offensive. From a legal point of view, the argument masks the fact that advocates are, by insisting on prosecuting those on the other side, effectively proposing to substitute their own views as to who should be prosecuted for those of the ICTR Prosecutor who is statutorily charged with that immense responsibility. Yet, even worse, as Goldstone's statements suggest, some of them have failed to account for the fact that charging decisions are made to reflect a number of different assessments including the likelihood of success in securing a conviction. That different prosecutors holding the same office might have taken a different approach, and exercised discretion differently, is beside the point. It is whether the decision taken can be justified as based on proper rather than improper criteria. Furthermore, supporters of the selectivity argument must bear the burden to satisfactorily answer an important practical question. That is, whether they would have been willing to forego the prosecutions of the worst of the architects and planners of the genocide hauled before the ICTR just for the sake of securing the presumed benefits of equality of prosecutions of both sides to the Rwandan tragedy. Here, we assume for the sake of argument, that any attempt to prosecute in the ICTR a top RPF leader might practically have made it difficult if not impossible for the Tribunal to secure Rwanda's cooperation.

Finally, we note that some leniency for the sitting power in a post-conflict society may be justified as a boon to stability and security. In a country recovering from a debilitating conflict, the prior political and social infrastructure is no longer in place. The social order is stressed and often under some tension. In such a context, while there may be legal merit in doling out punishment without regard to post-conflict standing, realpolitik may argue for preserving what power structures remain as the basis for establishing long-term social peace and stability.

### ***Breadth of Proceedings***

The UNSC's stated goal in establishing the ICTR was to prosecute 'persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994'.<sup>91</sup> Accordingly, the ICTR's jurisdiction is limited temporally, geographically and substantively. The *ratione materiae* (subject-matter jurisdiction) of the Tribunal is limited to prosecuting the crimes of genocide,<sup>92</sup> crimes against humanity,<sup>93</sup> and violations of Common Article 3 and Additional Protocol II of the Geneva Conventions.<sup>94</sup> The *ratione temporis* (temporal jurisdiction) of the Tribunal is confined to crimes committed in the calendar year 1994. The



Tribunal's *ratione personae* (personal jurisdiction) and *ratione loci* (territorial jurisdiction) are limited to 1) crimes committed by Rwandans in Rwanda and neighbouring states and 2) crimes committed by non-Rwandans in Rwanda.

These jurisdictional limitations created a highly focused mandate for the Tribunal. Notably, the mass killings broadly associated with the genocide in Rwanda did not begin until 6 April 1994, and were brought to an end in July 1994. As such, the court's temporal jurisdiction extends before and after the bulk of the overt criminal acts associated with the genocide, and is sufficient to capture *some* planning and preparation beforehand as well as some violence that accompanied the handover of power. The court's *ratione personae* allowed the Tribunal to bring charges against Rwandans who committed atrocities while fleeing Rwanda and the RPF takeover, limited to the aforementioned *ratione temporis*. In so structuring the Tribunal's mandate, the UNSC was able to avoid having the ICTR become responsible for litigating offences that might have been precursors of the genocide.<sup>95</sup> Similarly, had the mandate been left open-ended, as was the case for the ICTY, it might have been possible to prosecute crimes that occurred subsequently in the neighbouring states by individuals associated with either side of the Rwandan conflict.

In pursuit of its mandate, the ICTR indicted a total of ninety-three persons, of which forty-seven have been convicted or pleaded guilty, sixteen are pending appeal, twelve were acquitted, ten were transferred to national jurisdictions, and nine remain at large.<sup>96</sup> By way of comparison, the ICTY (which has much broader temporal jurisdiction) indicted a total of 161 persons, and the SCSL indicted just twenty-two. All said, the Tribunal was broad in its assessment of whom to hold accountable for the genocide, and conducted a fair amount of business for an international tribunal.

Seen from a domestic perspective, a criminal institution that managed to try few than 100 defendants in fifteen years would not be considered a resounding success if numbers of those prosecuted are our only calculus. But the quality, not just the quantity, of justice also matters.<sup>97</sup> In any case, as one of the first international courts since the end of World War II, the ICTR had to lay a substantial amount of groundwork. Although this was a time-consuming and often frustrating process, it was ultimately a necessary one.

### ***Quality of Proceedings***

The ICTR expended great effort to ensure that its proceedings generally adhered to the highest international standards, and in that respect is to be commended. The Statute of the Tribunal was revised several times to accommodate changes to court procedure. The Rules of Procedure and



Evidence, which were amended every year of the Tribunal's operation,<sup>98</sup> would be recognizable to a lawyer in any national jurisdiction. The RPE and the Statute also incorporate elements of both civil and common law traditions, further harmonizing disparate notions of justice across the globe.

Further, the fact that twelve cases before the Tribunal resulted in acquittal shows that this adherence to international norms was not simply expensive and time-consuming window dressing. No system is perfect, and not every decision is justifiable in retrospect, but the ICTR deserves credit for pushing vigorously for fair trials that simultaneously respected the rights of the accused and international norms. That is not to say that there were not many, and in some cases, unacceptable delays between the indictment, arraignment, trial, issuance of judgement and finalization of some of its most important cases. Some of these undue delays led to serious and legitimate questions about whether justice had been served.<sup>99</sup>

This adherence to international norms is not, however, an unalloyed good. In terms of peace and security, there is understandably a sense that 'those most responsible' were treated better than those not sufficiently responsible to merit international attention. For instance, the availability of capital punishment in Rwandan proceedings prior to 2007 ultimately means that some national defendants were treated 'more harshly' than ICTR defendants, and thus the international community's insistence on fair trials ultimately benefited the most guilty. It is arguable that when the UN is involved, we cannot – or should not – have it any other way.

### *Administering Cost*

All of these international standards come, literally, at a cost. One frequent critique of the ICTR (and the ICTY) is that they were quite expensive.<sup>100</sup> All told, the Tribunal is expected to cost roughly US\$1.75 billion over its lifetime, with a peak annual spending of US\$150 million in 2008.<sup>101</sup> On an individualized basis, the ICTR spent approximately US\$23.3 million per accused.<sup>102</sup>

Notably, the proceedings at the ICTR did not cost substantially more on a per-day basis than federal criminal trials in the United States.<sup>103</sup> However, the trials themselves lasted considerably longer than the average criminal trial, and thus the cost per *trial* is far greater than the average domestic proceeding (even in expensive jurisdictions).

Some of this expense is surely a product of the need to establish international precedent following the forty-five year hibernation of

international criminal law, the complexity of the subject matter, the need to translate witness testimony from Kinyarwanda to the working languages of the Tribunal, and to elicit testimony from witnesses about events that may have taken place ten years in the past. It is equally true that some expense could have been avoided through better pre-trial management, limitations on witnesses, more frequent use of judicial notice, and more thorough sharing of evidence across cases. Furthermore, the decision to locate the Tribunal in Arusha created geographic distance between the *locus commisi delicti* and the seat of the court. It is clear that this ultimately made the process of gathering evidence and securing witness testimony much more expensive as it required arrangements, safe houses and dedicated aircraft for witness travel.

Of course, the ICTR, the ICTY and the Residual Mechanism for those two courts are funded by the UN directly. The organization that created the court and gave it a mandate was also responsible for providing the resources necessary to accomplish those goals. This is not to say that the Tribunal did not experience budgetary pressures from New York, but only to say that the Tribunal had a substantially more stable funding base compared to others that came after it such as the SCSL.<sup>104</sup>

### ***Jurisprudential Impact***

The ICTR (and the ICTY), through individual proceedings and the appellate structure, did yeoman's legal work. Inasmuch as the only (and oft-cited) precedents were the Nuremberg and Tokyo Tribunals, the case law and normalization of fairly radical notions of international responsibility developed and normalized by the Tribunals is a real victory.

Several important contributions of the ICTR are worth noting, although a complete catalogue of its effects would be beyond the scope of this article. First and foremost, the ICTR (and the ICTY) played an integral role in giving effect to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,<sup>105</sup> and in 'confirming that genocide is an international crime, recognized as such in convention and custom, for which individual perpetrators may be held liable'.<sup>106</sup> To that end, the ICTR delivered the first ever conviction for genocide before an international tribunal in the case of Prosecutor v. Jean Paul Akayesu.<sup>107</sup> The Akayesu case also created the important precedent that sexual violence and rape can be acts of genocide when committed with the requisite specialized intent.<sup>108</sup> This impact of the Akayesu case continues to reverberate today, including with the advancement of that crime as a supplemental element to close a normative gap in the genocide convention in Africa's proposed regional criminal court.

Second, the indictment and guilty plea of former Rwandese Prime Minister Jean Kambanda contributed to an emerging understanding that traditional notions of sovereign immunity were falling by the wayside in the modern era. Official capacity of an individual has no effect on his criminal responsibility, at least as it relates to core crimes such as genocide, war crimes and crimes against humanity.<sup>109</sup>

Third, the ICTR contributed greatly to a working understanding of Common Article 3 and Additional Protocol II to the Geneva Conventions of 1949 as standards for armed conflict. Common Article 3 and Additional Protocol II both relate to *internal* armed conflict, and thus contain no implementation or enforcement provisions.<sup>110</sup> The explicit reference to these instruments in the ICTR Statute, and subsequent case law outlining the elements of each crime covered by the agreements, has helped to transform them into operating instruments of international criminal law.<sup>111</sup>

Lastly, the work of the both the Trial and Appeals Chambers has been cited on numerous occasions by other international criminal and national courts. In a certain respect, this is an accident of history; as one of the first tribunals, the ICTR had a better shot at laying the groundwork of modern genocide law. In the same way the ICTY had formed some kind of basis for the ICTR, so too did the ICTR affect the model of subsequent courts such as the SCSL.<sup>112</sup> However, that historical fact does not diminish the overall importance of the Tribunal to international justice.

## Sierra Leone

### *Brief History of the Conflict*

Sierra Leone was one of four British colonies in West Africa until it gained political independence in April 1961. After what seemed an auspicious start for democracy with the first transfer of power to an elected opposition party in an independent African state in 1967,<sup>113</sup> the country quickly degenerated into instability with a spate of military coups and counter-coups.<sup>114</sup> Ultimately, the civilian All People's Congress (APC) party formed a stable government around 1970. Unfortunately, the APC government stifled democracy by transforming itself into a despotic one-party regime and sustaining its stranglehold on the country through massive corruption, nepotism, plunder of public assets and exacerbation of ethnic and regional cleavages.<sup>115</sup> By the 1990s, bad governance and economic decay, among other factors, had created sufficient malaise for the outbreak of conflict in the country.<sup>116</sup>

In March 1991, a mix of approximately sixty armed men attacked the village of Bomaru in eastern Sierra Leone.<sup>117</sup> The attack turned out to be the

first salvo of the Revolutionary United Front (RUF) rebels apparently led by Foday Sankoh, a formerly low-ranking corporal in the Sierra Leone Army (SLA), whose ostensible goal was to overthrow the government of then-President Joseph Momoh. In a few weeks, the rebels quickly increased the intensity and frequency of their attacks, allegedly with logistical, financial, material and even combat support from Liberian fighters donated by Charles Taylor of the National Patriotic Front of Liberia (NPFL).<sup>118</sup> The ill-equipped SLA, which had more experience putting down peaceful pro-democracy student demonstrations than fighting a war, proved unable to contain the unrelenting and devastating guerrilla attacks. In a few months, most of eastern Sierra Leone had fallen under rebel control. The war soon spread to other parts of the country.

President Momoh lacked a coherent strategy to deal with the war and was ousted from power in April 1992. Two successive military regimes failed to end the war. Under pressure from Sierra Leoneans clamouring to participate in their country's governance through the ballot box, democratic elections were finally held in 1996. Sierra Leone People's Party candidate Ahmad Tejan Kabbah, who had run on a platform of restoring peace, won the elections. President Kabbah immediately entered into negotiations with the RUF and concluded a peace accord in Abidjan, Côte d'Ivoire. Despite this step toward the cessation of hostilities, the conflict resumed and yet another military coup took place. Kabbah fled to neighbouring Guinea where he set up a government in exile in Conakry.

With strong international backing, especially from the regional Economic Community of West African States (ECOWAS), Kabbah was reinstated in 1998. Around mid-1999, his government negotiated the Lomé Peace Agreement with the RUF in another attempt to end the conflict. The Lomé Agreement included an amnesty provision, Article IX, granting Sankoh, and all other combatants and collaborators, 'absolute and free pardon and reprieve' in respect of all their actions between the start of the war and the conclusion of the accords.<sup>119</sup> Despite this agreement, hostilities continued in the country until disarmament began in earnest in 2001. President Kabbah formally declared the war over in January 2002.

### ***Local Involvement***

Whereas the ICTR and the ICTY were established by the UN Security Council under its Chapter VII power, albeit with some limited input from the affected countries, the SCSL is a product of a bilateral treaty between Sierra Leone and the UN.<sup>120</sup> Thus, by its very nature as a consensual instrument, the SCSL incorporated more local concerns from its inception than the ICTR.

The agreement establishing the Special Court was the culmination of a process that began with a letter from Sierra Leonean President Ahmad Kabbah to the UNSC via the then Secretary General Kofi Annan requesting the international community's assistance in prosecuting those leaders who had planned and directed the brutal conflict in Sierra Leone.<sup>121</sup> President Kabbah maintained that international support was necessary to successfully prosecute those responsible for war-time atrocities due to the lack of legal, logistical and financial resources within the country.<sup>122</sup>

Through Resolution 1315, the UNSC formally endorsed President Kabbah's request to establish a Special Court, although it did not take the same definitive action as in Rwanda or the former Yugoslavia. Rather than creating another fully international tribunal with a mandate to try 'those persons responsible', the Security Council instead directed Secretary General Kofi Annan to negotiate an agreement with the Sierra Leonean government to establish an *independent* tribunal to try those bearing 'greatest responsibility'.<sup>123</sup> The subsequent agreement between the UN and the government of Sierra Leone signaled that the Special Court would be a different animal than the previous ad hoc tribunals. Coming as it did after the international community had had experiences with the Chapter VII model, it also attempted to address some of the perceived deficiencies of the ICTY and ICTR.<sup>124</sup>

Perhaps the most important accession to local concerns was the decision to locate the Special Court in Freetown, the capital of Sierra Leone. Unlike the ICTR and ICTY before it, the Special Court did its work in the *locus commisi delicti*. While both of the international Tribunals have been criticized for delivering justice from afar,<sup>125</sup> the SCSL specifically undertook to be present in the affected communities.

In addition to its advantageous location, the SCSL also actively undertook to engage with the populace of Sierra Leone from the very beginning. As part of this effort, the Office of the Prosecutor and the Registry set up day-long 'town hall' meetings in towns and cities around the country to discuss the work of the Special Court. In the first four months of the Special Court's existence, it is reported that the then Prosecutor David Crane visited every district and every major town in Sierra Leone.<sup>126</sup> Calling himself 'their prosecutor', Crane described the role of these meetings as one where he 'would go out and listen to the people of Sierra Leone tell me what happened in their country'.<sup>127</sup> One may rightly question whether the Outreach Office and the people 'up country' took the same lessons away from their meetings.<sup>128</sup> However, the substantial efforts to reach out to the local population and to keep them abreast of the SCSL's work shows some concern for local engagement and perhaps even local acceptance and local endorsement of its work.

The SCSL was also created with the participation of local jurists in mind. The Agreement establishing the tribunal provides that at least one-third of the Trial Chambers judges, two-fifths of the Appeals Chambers judges and the Deputy Prosecutor would be from Sierra Leone, and that the Government of Sierra Leone would participate in the SCSL's Management Committee.<sup>129</sup> Additionally, the Secretary General, who was responsible for appointing the key international staff, was to do so on the basis of recommendations of States, particularly member states of the Economic Community of West African States (ECOWAS).<sup>130</sup> The hope was that this would make the SCSL more relevant in the minds of Sierra Leoneans. But beyond the various positions reserved for Sierra Leone to appoint, there have been some questions about the extent of substantive local lawyer participation in the court's processes. The failure to meaningfully involve and/or to integrate them into the tribunal's processes is anecdotally reported to have created some friction between the tribunal and the local bar, when the national lawyers realized that there would be limited opportunities for them to serve in the tribunal.<sup>131</sup> Yet, international criminal law literature has been touting that one of the alleged benefits of the SCSL model was precisely that it enabled nationals and internationals to work side by side in service to a common cause.<sup>132</sup> It is unclear how much of this theory came out in practice.

Nevertheless, the Special Court took at least four steps to involve the local community from its inception. First, the SCSL was located in Freetown. Second, it was given jurisdiction over some violations of Sierra Leonean law, thus bringing it home in a symbolic sense, even if in practice those offences were never used to bring charges due to the prosecutorial decision not to do so.<sup>133</sup> Third, the SCSL undertook a serious outreach effort to inform the affected population about its mandate and work.<sup>134</sup> Here, in contrast to its predecessors, it benefited from its location in Freetown. This, however, is not to say that it did not face challenges in expanding its footprint in a country with limited road and other infrastructure.<sup>135</sup> Fourth, a certain number of places within the SCSL's hierarchy were reserved specifically for Sierra Leoneans by the Statute, thus ensuring a floor for the level of local involvement. This contrasts favourably with the ICTR model. Yet, due to the Kabbah's government choice not to use its appointments to put Sierra Leoneans in some of the key tribunal positions (especially that of Deputy Prosecutor), the extent of local involvement proved to be less than many would have predicted and gave rise to some disappointment in the local bar.

### ***Competing National Proceedings***

As is evident by a review of the Special Court's mandate, the SCSL was not empowered to right all wrongs that may have been committed in the country during the decade-long conflict. Rather, the SCSL was limited to prosecuting

serious violations of international law, war crimes, crimes against humanity and a select set of national laws which occurred during the latter half of the conflict. The remainder of the work of helping to restore respect for the rule of law, healing open wounds, stabilizing the peace and building the local legal capacity with the Sierra Leonean authorities. Of course, some of those goals were, presumably, for political and optical reasons, mentioned in the Security Council Resolution preceding the creation of the Tribunal. They were frequently the result of discussions. This generated high expectations, in Sierra Leone and elsewhere, that could simply not be fulfilled. Espousing wider expectations for the SCSL was not unique, and in fact, is a common feature of UN involvement in the Yugoslavia and Rwanda contexts – a phenomenon that has led some scholars such as Marjan Damaska to call for a downgrading of expectations.<sup>136</sup> The argument is that such unrealistic expectations are not only unfair impositions on a criminal court, but that they also tend to inevitably lead to high disappointments.

The government of Sierra Leone took two important steps to address the conflict. First, Sierra Leone created a Truth and Reconciliation Commission (TRC) that operated in tandem with, and independent of, the SCSL. The TRC was established pursuant to Article VI of the Lomé Peace Accord<sup>137</sup> with the goals of creating ‘an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone [from 1991 to 1999], to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered’.<sup>138</sup> Although the agreement included a blanket amnesty provision,<sup>139</sup> the TRC itself was not empowered to grant any pardons or extend amnesty to any combatants.<sup>140</sup>

While the Special Court and the TRC had complementary mandates, there were some operational conflicts. In particular, ‘some individuals were hesitant to testify before the TRC out of a fear, real or perceived, that they could be prosecuted’ based on their testimony.<sup>141</sup> This problem was highlighted by the case of Hinga Norman, a former deputy minister in the custody of the SCSL who wished to testify publicly before the TRC. The Special Court ultimately found that Norman could testify, but that the proceedings must be closed in order to prevent diminution of the SCSL’s process.<sup>142</sup> In its final report, the TRC issued several recommendations for future joint processes, including the establishment of ‘the basic rights of individuals in relation to each body in different circumstances. In particular, the right of detainees and prisoners, in the custody of a justice body, to participate in the truth and reconciliation process should be enshrined in law’.<sup>143</sup>



In addition to the parallel reconciliation process, national courts also tried thirty-one members of an RUF splinter group, known as the West Side Boys, for conspiracy to commit murder. The prosecution initially filed thirty-one counts against a total of twenty-seven accused. Charges against sixteen of the accused were dismissed after the High Court found that there was no case for them to answer.<sup>144</sup> Of the remaining eleven defendants, seven were convicted on six counts of conspiracy to commit murder and sentenced to ten years imprisonment for each count, to run concurrently.<sup>145</sup>

Given the prosecution's inability to provide sufficient evidence against a majority of the accused, the West Side Boys case suggests that the national authorities were not up to the task of prosecuting crimes related to the conflict. The case can also be understood as a statement on the state of the judiciary. One of the principal justifications that the government used when it sought international support to establish the SCSL was that the local justice system lacked the capacity to prosecute.<sup>146</sup> But, it seemed that the members of the local bar who met with the UN felt that there was sufficient capacity to prosecute.<sup>147</sup> Thus by holding the government to proof of the charges that it had brought, the local judiciary vindicated that view. Leaving practicalities aside, the question arises as to whether the government would have been able to prosecute more offenders, assuming it was willing to do so, in light of the amnesty clause contained in the Lomé Accord which granted amnesty to all combatants in the conflict.<sup>148</sup>

### ***Competing International Proceedings***

There is anecdotal evidence suggesting that one or two jurisdictions carried out investigations of Sierra Leoneans who had arrived in their territories. They were alleged to have been involved in international crimes, although presumably because the evidence was weak no trials ever materialized. In the end, in contrast to the Rwanda situation, there were no significant trials of combatants or leaders outside of the SCSL and the Sierra Leonean national judiciary. The only international action against a party connected loosely to that country's conflict was the trial of Chuckie Taylor, the son of former Liberian President Charles Taylor, on torture charges in the US. The younger Taylor is a US citizen by dint of his being born there, and the criminal conduct with which he was charged was related to his actions as head of the Anti-Terrorism Unit in Liberia. Although his father was charged with crimes against humanity and war crimes by the SCSL, no explicit connection between Sierra Leone and Chuckie Taylor was made by the US Justice Department.<sup>149</sup> It is hard to establish why definitively, but part of the reason for this appears to be that the younger Taylor might not have been implicated in the violence in Sierra Leone. Another might be that there was already strong evidence of his involvement in crimes in Liberia.



### *Impunity and 'Victor's Justice'*

The conflict which gave rise to the SCSL was a complex one which defies easy description for its motivations. Among other factors, it was tied to bad governance and the apparent desire by a few men to exploit the country's diamond wealth for personal gain.<sup>150</sup> The list of accused before the Special Court reflects this complexity to some degree. Of the twelve defendants tried by the Special Court for crimes related to the conflict, five were drawn from the Revolutionary United Front,<sup>151</sup> four were members of the Armed Forces Revolutionary Council,<sup>152</sup> and three were members of the Civil Defence Forces.<sup>153</sup> In a broad sense, the SCSL indicted combatants from 'all sides' of the conflict, if we leave aside the alleged responsibility of West African peacekeepers who received an exemption from its jurisdiction.<sup>154</sup>

To mention this diversity is not to say that the number of prosecutions or the identity of the individual defendants is necessarily correct. Charles Jalloh, for instance, has argued that there was an over-inclusiveness with respect to those that were actually prosecuted.<sup>155</sup> Yet, the argument can be made that the diversity in the list of defendants was a good step towards showing that no party to a conflict is above the law. In this sense, the practice at the Special Court arguably stands in contrast to that at the ICTR, where only one 'side' of the underlying conflict was indicted, and where, consequently, allegations of 'victor's justice' ran rampant throughout the Tribunal's tenure. Conversely, in Sierra Leone, the allegation has now surfaced in a new form about 'White man's' justice. On the other hand, as mentioned earlier in relation to the selectivity argument vis-à-vis non-prosecution of any Tutsis before the ICTR, there is perhaps a price to be paid for equality of prosecutions. That price suggests a moral and legal equivalence to the individual criminal responsibility between those who fomented war (such as the RUF) for selfish reasons and those that tried to stop it in acts of patriotism for selfless reasons, but in the process, committed some crimes. It might have also undermined the long term peace in Sierra Leone given the controversy that has since arisen from the CDF Trial and the perception that it led to among many Sierra Leoneans.<sup>156</sup>

The Special Court's arguable achievements in breaking the trend of victor's justice after mass atrocity do not necessarily carry over into the realm of impunity. One of the consequences of the Tribunal's narrow mandate is that relatively few people were tried. This is the problem of under-inclusiveness.<sup>157</sup> The bulk of the combatants were left for the national judiciary to deal with, and assuming amnesty issues did not bar such prosecutions for international crimes before the domestic courts. These authorities simply lacked the resources to effectively try a significant portion of the country's population. As a result, people who were famous for their exploits during the conflict

remain among the population. Some of them arguably fell within the 'greatest responsibility' jurisdiction of the SCSL, but because the Special Court never prosecuted them and the neglect of the Sierra Leonean authorities, they are not within the reach of the national judiciary.<sup>158</sup>

### ***Breadth of Proceedings***

Much like its predecessors, the *ratione materiae* (subject-matter jurisdiction) of the SCSL extended to crimes against humanity,<sup>159</sup> war crimes,<sup>160</sup> and other serious violations of international law.<sup>161</sup> However, the SCSL's jurisdiction was distinct from those of the International Tribunals in two important respects. First, the Special Court did not have jurisdiction over the crime of genocide. The international crimes are limited to those listed above. Second, as a hybrid tribunal, the SCSL was also granted jurisdiction over certain domestic Sierra Leonean crimes, including the abuse of girls and wanton destruction of property.<sup>162</sup> Thus, the Special Court's role within the international and national judicial structure was markedly different than that of the ICTR and the ICTY. Of course, whereas the tribunal used the international crimes in its cases, no Sierra Leonean crimes were used. On the other hand, we could not find evidence that the government used those same crimes from its national laws or international crimes to prosecute war related cases in its own courts.

Further, unlike the ICTR, the Special Court's *ratione temporis* (temporal jurisdiction) extended well before the end of hostilities. This was a function of the fact that the conflict was ongoing. Thus, the SCSL's jurisdiction includes all crimes committed after 30 November 1996, nearly four years before the signing of the Agreement and six years before the Statute entered into force. Although the Sierra Leonean government had wanted the jurisdiction to extend to the beginning of the war in March 1991, the UN disagreed largely for financial reasons.<sup>163</sup> Readers will recall that the ICTR's mandate was limited to crimes committed during the calendar year of 1994, limiting the Tribunal's ability to address predicate crimes that culminated in the genocide. This innovation at the Special Court can be seen as either an attempt to address that deficiency, as a delegation of authority already held by the Sierra Leonean judiciary, or both.

Lastly, the SCSL's *ratione personae* (personal jurisdiction) and *ratione loci* (territorial jurisdiction) differ from those of the ICTR. While the ICTR had jurisdiction over both Rwandans and certain foreigners, the SCSL is empowered to try 'persons who bear the greatest responsibility' without specific reference to nationality.<sup>164</sup> However, this broader personal jurisdiction is limited by a requirement that the crimes at issue must have taken place 'in the territory of Sierra Leone'.<sup>165</sup> This differs from the ICTR's mandate

granting jurisdiction over crimes committed by Rwandans ‘in neighbouring States’.<sup>166</sup> There was no provision for the prosecution of crimes that might have been committed by the same combatants involved in cross border attacks in Liberia and Guinea, a common occurrence during the war.

It may at first glance seem that the SCSL had a fairly broad mandate, at least over crimes that took place within Sierra Leone. However, the ultimate limiting factor was the term ‘greatest responsibility’.<sup>167</sup> In normal parlance, this standard may be synonymous with the ‘most responsible’ mandate of the ICTR. In practice, however, the term ‘greatest responsibility’ operated as a limitation on the number and breadth of trials before the SCSL. A fair amount of energy at the court was devoted to discerning an operative meaning of ‘greatest responsibility’.<sup>168</sup>

In the end, the Special Court tried only twelve defendants on charges related to the conflict.<sup>169</sup> One of those defendants, however, was the head of a neighbouring state at the time he committed the charged crimes. This simple fact complicates the act of assessing the breadth of proceedings before the SCSL. On the one hand, relatively few trials were conducted. In this sense, the Special Court Prosecutor was either fulfilling his narrow mandate or using too restrictive an interpretation of ‘greatest responsibility’ that unnecessarily limited the SCSL’s reach. On the other hand, the indictment, trial and ultimate conviction of Charles Taylor suggests that the SCSL attempted to move beyond national borders to bring one of the biggest of big fish defendants to justice. In this sense, it can be argued that the limited number of prosecutions might not have undermined their *breadth*.

### ***Quality of Proceedings***

Like the ICTR and the ICTY before it, the SCSL took great pains to bring international standards of justice to bear. The Rules of Procedure and Evidence were amended fourteen times between 2003 and 2012 as court practice evolved.<sup>170</sup> This could be taken as an indication of adherence to that commitment. At the same time, there are legitimate questions that have been raised about the double role of judges as implementers and drafters of the rules that guide their processes in these tribunals. Nevertheless, besides the ICC, all other ad hoc tribunals going back to Nuremberg provided for judicial drafting of the rules of court. Arguably, this promotes efficiency in the process as the tribunals learn by doing and improve their procedures over time in light of the practical challenges faced during the trials.

The structure and processes of the Special Court were apparently designed to incorporate local concerns from its inception, in contrast to the situation in the ICTR. In particular, the guarantee of a certain number of court

appointments for Sierra Leoneans and for international lawyers<sup>171</sup> helped to ensure both that the court's proceedings adhered to international standards and took local viewpoints into account. Yet, as noted earlier, save for a small number of appointments to the judiciary the remainder of those positions were occupied by non-Sierra Leoneans. For example, the first two national appointments to the position of Deputy Prosecutor selected a Sri-Lankan (Desmond de Silva) and later on an Australian (Christopher Staker). It was only towards the end of the Tribunal's life, when for all intents and purposes the work was done, that the government proposed a Sierra Leonean (Joseph Kamara) for the position.

National law was also to be used in the Tribunal. The sources of law applicable to the Special Court includes 'general principles of law derived from national laws of legal systems of the world including, as appropriate, the national laws of the Republic of Sierra Leone, provided that those principles are not inconsistent with the Statute, the Agreement, and with international customary law and internationally recognized norms and standards'.<sup>172</sup> On one level, of course, this provision can be seen as a step towards making Sierra Leonean law relevant to the work of the SCSL – above and beyond the (unused) national crimes included in the subject matter jurisdiction. Another reading of this provision is that, even though it provided for the use of principles of law from all national legal systems, it mentioned Sierra Leone as a source with a qualifier (as appropriate), thereby limiting the potential use of such laws at the Special Court. The implication was that the use of such principles was to occur only if there was no clash between such laws and the applicable instruments (the SCSL Statute and UN-Sierra Leone Agreement) and customary international law.

A similar rule provided for examination of Sierra Leonean practice in respect of determination of penalties before the Tribunal. But these too were subordinated to the international and appeared not to have been taken seriously in the Court's judgements. Ultimately, it seems cogent to argue that although lip service was paid towards Sierra Leonean laws, the practice differed dramatically. Nevertheless, as one of us has argued elsewhere, if the alternative to the creation of the SCSL was prosecution by the standards of the then extant Sierra Leonean national justice system, the SCSL 'would probably be deemed exemplary'.<sup>173</sup>

Two main concerns undermine the generally positive assessment of the quality of the SCSL's work. First, the overly conservative interpretation of the Special Court's mandate by the Prosecutor, and eventually the Chambers, resulted in far fewer (and therefore more selective) prosecutions than many Sierra Leoneans would have hoped for. Second, the rights of the accused

before the tribunal may have been negatively affected by the very limited funds available for their defence counsel, and the long period of pre-trial detention.

With respect to the Special Court's mandate, recall that the SCSL was tasked with prosecuting those who bore the 'greatest responsibility' for the serious violations of international law and select provisions of national law, 'including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone'.<sup>174</sup> However, the term 'greatest responsibility' was not explicitly defined by any of the court's constitutive documents, nor was there agreement among the contracting parties as to its precise definition.<sup>175</sup> Not even the various organs of the SCSL agreed on an operative definition. The Trial Chamber hearing the CDF case held that the phrase was both a jurisdictional limitation and a guidepost for prosecutorial discretion.<sup>176</sup> An accurate assessment of whether there are reasonable grounds to support a finding that a particular accused bore 'greatest responsibility' should be, in the CDF Trial Chamber's view, conducted by the Confirming Judge at the pre-trial stage. 'Whether or not *in actuality* The Accused could be said to bear the greatest responsibility can only be determined by the Chamber after considering all the evidence presented during trial'.<sup>177</sup> The Armed Forces Revolutionary Council (AFRC) Trial Chamber, on the other hand, found that the phrase was meant solely to 'streamline the focus of prosecutorial strategy'.<sup>178</sup> The judges rejected the idea that the phrase created a limit on personal jurisdiction that would require them to dismiss a case if the threshold were not met.<sup>179</sup> Accordingly, the AFRC Chamber did not think itself competent to review the Prosecutor's decision to bring an indictment against a particular person because the Office of the Prosecutor is an independent organ charged with making such assessments.<sup>180</sup> Ultimately, the Appeals Chamber came down on the side of the AFRC Trial Chamber, finding that the phrase 'greatest responsibility' was meant to guide the use of prosecutorial discretion, and not as a jurisdictional limitation. The Appeals Chamber concluded:

It is evident that it is the Prosecutor who has the responsibility and competence to determine who are to be prosecuted as a result of investigation undertaken by him. It is the Chambers that have the competence to try such persons who the Prosecutor has consequently brought before it as persons who bear the greatest responsibility.<sup>181</sup>

As a result of this deference to prosecutorial discretion, the *raison d'être* of the SCSL was essentially delegated to one of the Court's organs without judicial oversight.<sup>182</sup> Under serious political and fiscal constraints, the Prosecutor's interpretation of the mandate to try those bearing 'greatest responsibility' limited the list of suspects from 30,000 to about twenty.<sup>183</sup> When combined

with the Court's desire to avoid the imposition of 'victor's justice', this narrow interpretation of the mandate left 'an unusually bottom-heavy' indictment list.<sup>184</sup> A number of combatants whose war-time conduct was especially brutal were not indicted,<sup>185</sup> nor were prominent international businessmen who benefited from the illicit diamond trade.<sup>186</sup>

The second significant issue for the Court's proceedings came as a result of funding constraints (discussed in more detail in Part VI below). The SCSL Statute incorporates language from the International Covenant on Civil and Political Rights<sup>187</sup> guaranteeing certain rights to the accused, including the rights to be presumed innocent, to a fair and public hearing before an impartial tribunal, to counsel, to adequate time and facilities to prepare their defence, and to cross-examine witnesses.<sup>188</sup> In order to fulfil these guarantees, the SCSL undertook the innovative and unprecedented creation of a Defense Office.<sup>189</sup> As an organ of the Court, however, the Defense Office was under competing mandates to ensure the rights of the defendants and to keep costs down.<sup>190</sup> Ultimately, the 'SCSL was, in practice, so constrained by the general lack of funding, that its treatment of the accused and defense rights gave the unfortunate impression of being setup with the sole purpose to convict'.<sup>191</sup>

### *Administering Cost*

Unlike the ICTR and the ICTY before it, the SCSL relied on voluntary contributions of states to support its work. The prior, fully international tribunals received their funding from assessed UN dues.<sup>192</sup> All in, the SCSL was expected to spend US\$257,000,000 over its lifetime, with an annual peak of US\$36,000,000 in 2007.<sup>193</sup> On an individual basis, the SCSL will have spent roughly US\$285,000,000 per completed trial.<sup>194</sup> In absolute terms, then, the SCSL was markedly cheaper than the ICTR (which cost roughly US\$1.75 billion). However, in relative terms, the SCSL's lower price tag was not a result of its efficiency; the per-defendant costs are substantially the same for either court.<sup>195</sup>

No doubt a function of what David Scheffer has called 'tribunal fatigue' at the Security Council,<sup>196</sup> the SCSL was created with a voluntary funding mechanism whereby member states, IGOs and NGOs would contribute funds, equipment, service and expert personnel on their own accord.<sup>197</sup> In recognition of this unique funding structure, the 'important contributors' to the SCSL would also be given a position on the Management Committee, which was charged with assisting 'the Secretary-General in obtaining adequate funding, and provide advice and policy direction on all non-judicial aspects of the operation of the Special Court, including questions of efficiency, and to perform other functions as agreed by interested States'.<sup>198</sup> In theory, then,

the SCSL would be directly accountable to the states and groups who chose to support the Court's work, rather than the UN bureaucracy as a whole.<sup>199</sup> Former SCSL Prosecutor Stephen Rapp described this voluntary funding arrangement as a 'compact model' wherein the '[t]hose involved with the court would essentially put together a plan and go to world capitals saying, "This is what we want to do. If you think it is important, contribute your tax money to this cause. [...] If you provide us with contributions to meet [our] budget, you will see this quantity of justice"'.<sup>200</sup>

In practice, this voluntary funding mechanism meant that 'the success of the Court depended upon the level of funding that it could generate from U.N. members'.<sup>201</sup> The initial plan was that the SCSL would run for three years,<sup>202</sup> and thus the scope of the fund-raising task that the SCSL would undertake over the next decade was not well understood at the outset. The implication that the Special Court's work would only last three years 'created high and unrealistic expectations as to what it could accomplish in the time it had'.<sup>203</sup> Further, the reliance on third-party funding resulted in disconnection between the SCSL and its founding entities.<sup>204</sup>

The end result of implementing this voluntary funding mechanism was a general reduction in the efficacy and, to some extent, the perceived legitimacy of the SCSL. The lack of funding, *inter alia*, affected the Prosecutor's interpretation of the mandate to try those bearing 'greatest responsibility' as encompassing only twenty defendants;<sup>205</sup> the ability of the Outreach Office to bring the Court's message to the affected population;<sup>206</sup> the defence and fair trial rights of the accused;<sup>207</sup> and the ability of the Court's staff to devote their energies to the work of justice rather than fundraising.<sup>208</sup>

The funding mechanism also adversely affected the perception of the Special Court, at least to some degree. In place of the charge of 'victor's justice' levelled at previous tribunals, the SCSL was subject to charges of 'donors' justice', wherein the concerns of the donors in securing a 'return' on their 'investment' and/or securing an efficient outcome were apparently considered paramount to the concerns of substantive justice.<sup>209</sup>

### ***Jurisprudential Impact***

The Special Court has made significant contributions to the state of international criminal law, despite having completed relatively few trials.

Perhaps the SCSL's most important contribution was its successful indictment, arrest, trial and conviction of a head of state, Charles Taylor of Liberia.<sup>210</sup> Taylor was indicted by the Special Court on eleven counts of crimes against humanity, war crimes, and other serious violations of international law.<sup>211</sup> The Prosecutor alleged that Taylor planned, instigated and/or ordered



the commission of crimes within the SCSL's jurisdiction, invoking command responsibility and joint criminal enterprise bases. The Taylor defence team sought to quash the indictment based on Taylor's head of state immunity, traditionally recognized in international law.<sup>212</sup> The Trial Chamber, relying on Article 6(2) of the SCSL Statute, practice at the IMTs, ICTs and ICC, and various *amici* briefs, found that Taylor was not immune from prosecution.<sup>213</sup> First, Taylor was no longer head of state at the time of his indictment, and hence personal immunity (*ratione personae*) was inapplicable.<sup>214</sup> Second, and more importantly, the functional immunities (*ratione materiae*) which protect activities of officials acting in their official capacity on behalf of their state, did not apply to cases before 'certain international criminal courts'.<sup>215</sup> The Appeals Chamber determined that the SCSL was, in fact, an international court because of its establishment by international treaty, the language of Security Council Resolution 1315, the similarity of its mandate to those of the ICTY, ICTR and ICC.<sup>216</sup> After this important ruling, the SCSL proceeded with Taylor's prosecution largely as it would with any other defendant (location of the trial aside). The SCSL's decision helped 'consolidate an emerging trend [...] that establishes an exception to personal immunities accruing to incumbent heads of state as far as the jurisdiction of an international criminal tribunal is concerned'.<sup>217</sup>

Another important contribution is the SCSL's jurisprudence on child recruitment.<sup>218</sup> The use of underage soldiers has been a sadly consistent part of modern asymmetrical warfare. In the CDF Case, the SCSL held individual defendants liable for the recruitment and use of child soldiers as a crime under international law. Among those indictees affiliated with the CDF was Sam Hinga Norman, who had commanded the Kamajors (a militia of traditional hunters) in support of the Government's action against rebel factions. Part of the indictment against Norman alleged that he had systematically forced children under the age of fifteen into combat. Norman argued that, even if proven, this did not amount to a recognized crime under customary international law during the relevant time frame, and if it had become a rule of international law, it did so only after the treaty establishing the ICC was signed in 1998.<sup>219</sup> As such, Norman contended that the indictment violated the principle of *nullum crimen sin lege* (no crime without law). The Appeals Chamber, in another important jurisdictional ruling, found that prior international agreements, including the Additional Protocols to the Geneva Convention of 1977, the Convention on the Rights of the Child of 1989, the Fourth Geneva Convention of 1949 and the African Charter on the Rights and Welfare of the Child, all contained sufficient indicia of state practice and *opinio juris* to support the assertion that child recruitment crystallized into a



rule of customary international law prior to 1996.<sup>220</sup> This decision marks a first in international law.

The SCSL also made significant contributions to another disturbing facet of modern conflict, namely that of sexual violence targeting women. The species of this violence found in Sierra Leone was formulated as the crime against humanity of 'forced marriage'.<sup>221</sup> During the Sierra Leonean conflict (and others) women were forced to 'marry' combatants and were 'raped repeatedly; made to cook, clean, and care for their captor-husbands; beaten, branded, and cut; and many became pregnant and were forced to bear and then rear the children'.<sup>222</sup> Defendants in both the RUF and AFRC cases were charged with independent counts of forced marriage. As with the interpretation of the Court's mandate (discussed in Part V above), the Trial Chambers came to opposite conclusions in the face of challenges by the defendants. The RUF Trial Chamber upheld the charge.<sup>223</sup> The AFRC Trial Chamber, on the other hand, found that the purported crime of 'forced marriage' was subsumed by the other charges of 'sexual slavery', and hence were redundant.<sup>224</sup>

It fell to the Appeals Chamber to resolve the deadlock. The judges of that chamber sided with the RUF Trial Chamber, holding that forced marriage is a separate crime against humanity:

[B]ased on the evidence on record, the Appeals Chamber finds that no tribunal could reasonably have found that forced marriage was subsumed in the crime against humanity of sexual slavery. While forced marriage shares certain elements with sexual slavery such as non-consensual sex and deprivation of liberty, there are also distinguishable factors. First, forced marriage involves a perpetrator compelling a person by threat of force [...] into a conjugal association with another [.]. Second, unlike sexual slavery, forced marriage implies a relationship of exclusivity between 'husband' and 'wife', which could lead to disciplinary consequences for breach of this exclusive relationship. These distinctions imply that forced marriage is not predominantly a sexual crime.<sup>225</sup>

Although not all commentators will accept the Appeals Chamber's reasoning regarding the existence of this crime at international law prior to the commission of the acts,<sup>226</sup> the Special Court's work in this area has nonetheless provided a bases for future prosecutions on these grounds.

Another significant contribution of the SCSL came in its treatment of the amnesty provisions of the treaty that signaled the cessation of hostilities in Sierra Leone.<sup>227</sup> That treaty, the Lomé Accord, granted blanket immunity to 'absolute and free pardon and reprieve to all combatants and collaborators with respect to anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement'.<sup>228</sup> This provision was quite

understandably cited by defendants before the SCSL, who felt that the Special Court's personality as a creation of a treaty involving a signatory to the Lomé Accord prevented it from abrogating the amnesty granted by Sierra Leone. The Statute of the SCSL, for its part, specifically prohibits application amnesty to any of the international crimes within its jurisdiction.<sup>229</sup> The Appeals Chamber upheld application of this prohibition on amnesty, finding that:

Where jurisdiction is universal [as with grave international crimes] a State [such as Sierra Leone] cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty. [...] A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember.<sup>230</sup>

This decision has made it 'very clear that in international peace negotiations, amnesties are off the table for genocide, war crimes, and crimes against humanity'.<sup>231</sup>

## **Liberia**

Before we turn to Liberia, two preliminary comments are in order. First, that country's conflict was intimately linked to the Sierra Leone war. Often, the same rebel groups and fighters were involved in carrying out war time atrocities in each of the countries. Second, in terms of sheer scale, it is reported that the war in Liberia resulted in the deaths of many more people than in Sierra Leone. Third, in the same way civil society in Sierra Leone advocated for justice for victims of the war through criminal prosecutions, Liberians have also argued that criminal accountability ought to be meted out for both pragmatic and principled reasons. Without any accountability, the prospects for old wounds to remain open instead of healed remains strong, sowing the seeds for future violence. Finally, although one can see how rebels and Liberian government fighters could seek amnesty for themselves, it is difficult to accept the failure of Liberian authorities to consider seriously the country's truth commission recommendations that war time atrocities be prosecuted. Given all these factors, and owing to the fact that we need to understand better what might make accountability possible in one African country but not in another, the Liberian case study has been included.

### ***Brief History of the Conflict***

Liberia's history is to some extent unique. It was established in 1847 by freed American slaves who 'returned' to Africa with the help of the US government and the assistance of the American Colonization Society.<sup>232</sup> These colonizers

saw a future of self-determination in Africa that was denied to them in the land of their enslavement. Many in America, including those in favour of abolition, were troubled by what, exactly, was to be done with the freed slaves once the bonds of servitude were severed. Thus 'returning' to Africa became a perceived net positive for both the formerly enslaved and the race-sensitive American government.

Needless to say, the land that was chosen by the colonialists was not uninhabited. Rather, there were large and distinct native populations on the land at the time of the Americans' arrival. The freed American slaves unfortunately used their experience of the Western labour and economic structures, which once used them as human grist, against the native populations. The resultant history of the nation of Liberia is one in which these Americo-Liberians, which comprised less than 5 per cent of the population and their descendants controlled the nation's social, political and economic life to the exclusion of the indigenous populations.<sup>233</sup>

The last of these Americo-Liberian leaders, William Richard Tolbert, Jr., was deposed in a 1980 coup lead by a young Master Sergeant in the Liberian Army, Samuel Doe.<sup>234</sup> Doe ruled Liberia in a rather ruthless and corrupt fashion throughout the 1980s.<sup>235</sup> Several different factions sought to end Doe's rule through military means, and enlisted the assistance of Libya's Muammar Gaddafi in training for a military confrontation with the entrenched regime. 'The most prominent of these characters was Charles Taylor, leader of the National Patriotic Front of Liberia (NPFL).'<sup>236</sup> From December 1989 to July 1990, Taylor led rebel forces from Nimba County (near the border with Côte d'Ivoire) to the capital, Monrovia.<sup>237</sup> Signaling the ethnic character of the conflict, Taylor's march to Monrovia was characterized by 'destruction, arson, burning, looting and the killing of members of ethnic groups associated with Doe, or opposed to his NPFL'.<sup>238</sup>

The Economic Community of West African States (ECOWAS) organized a monitoring group (ECOMOG) to monitor the tentative peace secured by arms in Monrovia. The monitoring group was quickly drawn into conflict through attempts to enforce peace between the warring factions.<sup>239</sup> This international involvement led Taylor to form something of a partnership with Foday Sankoh, the leader of the Revolutionary United Forces (RUF), then engaged in the conflict in neighbouring Sierra Leone. The RUF and NPFL forces supported one another's actions in their respective theatres of conflict although there is compelling evidence that they had met and made common cause with each other during their days in Libya or not long afterwards.<sup>240</sup> In response to this cross-border partnership, the government of Sierra Leone created the United Liberation Movement for Democracy

(ULIMO), composed of Liberian members of the Sierra Leonean armed forces, to fight against the RUF. These operations eventually drew ULIMO into the conflict in Liberia proper.<sup>241</sup>

In 1996, ECOWAS brokered a ceasefire between the parties, which preceded fresh presidential elections in 1997. Taylor won those elections by a large margin, although it was obvious that the elections took place in a context of fear in which it was clear to the population what failure to vote for the NPFL candidate would mean.<sup>242</sup> 'Between 1997 and 2000, Taylor's regime continued the history of oppression, intimidation, torture, execution of political opponents, arbitrary detentions and extra-judicial killings characteristic of previous governments.'<sup>243</sup> Two important factions were created to oppose Taylor's government in Monrovia. First, Liberians United for Reconciliation and Democracy (LURD), a predominantly Krahn group, formed in the Sierra Leonean capital Freetown in 2000. Second, an offshoot group of LURD associated with ULIMO-J from the First Civil War formed the Movement for Democracy in Liberia (MODEL) in 2003. LURD began to advance on Monrovia from bases in Guinea; MODEL operated out of bases in Côte d'Ivoire with the assistance of Ivorian President Laurent Gbagbo.<sup>244</sup>

In the summer of 2003, Taylor found himself in a precarious situation. LURD and MODEL had fought their way from their respective borders to the outskirts of Monrovia. Taylor had been indicted by the SCSL in March of that year. That indictment was unveiled as he attended ceasefire talks in Ghana. With pressure mounting, both militarily and politically, Taylor returned to Liberia and subsequently agreed to leave the capital in return for an offer of asylum in Nigeria.<sup>245</sup> The Comprehensive Peace Agreement (CPA) between the various combatants brought formal hostilities to a close in August 2003 and the creation of a transitional government.<sup>246</sup> Most notably for our purposes, the CPA provided for the creation of a Truth and Reconciliation Commission (TRC)<sup>247</sup> and did not provide any specific authority for either criminal prosecutions or international involvement.

### ***No International or Internationalized Proceedings to Consider***

The entirety of the proceedings related to the adjudication of the atrocities committed during the First and Second Civil Wars in Liberia (1989–1996 and 2000–03, respectively) were conducted by the national Truth and Reconciliation Commission. For that simple reason, we are unable to consider in this paper several of the metrics we have previously applied to the ICTR and SCSL. In particular, local involvement, competing prosecutions, breadth of the proceedings, quality of the proceedings, cost of administration and

jurisprudential impact are simply inapplicable to the situation in Liberia. Without diminishing the work of the Liberian TRC, formal criminal trials of either a national or international character were not part of the reconciliation process in that country. Yet, there have been and continues to be calls for prosecutions of war criminals responsible for atrocities in Liberia.<sup>248</sup>

### ***Benefits of National Action***

Acknowledging the inapplicability of criminal justice metrics is not to say that the TRC had no effect on the end goals of promoting peace and security. The Truth and Reconciliation process in Liberia yielded at least three significant benefits that were also served (or purportedly served) by the criminal justice processes discussed above.

First, the TRC's final report is a voluminous and authoritative account of the history, challenges, and internal tensions that led to the conflicts in 1990 and 2003. Among other things, the TRC report contains analysis of the historical antecedents to the conflict,<sup>249</sup> the effect of the conflict on women,<sup>250</sup> the role of children in the wars,<sup>251</sup> and economic crimes, exploitation and abuse before during and after the conflict.<sup>252</sup> To the degree that the ICTR and SCSL were intended to act or de facto acted as the official historians of their respective conflicts, the TRC's final report shows that this function need not be inextricably linked to criminal prosecution.

Second, whatever its ultimate drawbacks, the TRC process was a domestic institution geared toward using local perceptions, context and sensitivities in assessing the brutal conflicts from which the country had recently emerged. To the degree that the ICTR, and (to a lesser degree) the SCSL were viewed as foreign institutions imposing inapplicable justice from afar, the Liberian effort to deal with the legacy of conflicts internally with only limited international assistance is laudable.

Third, the TRC explicitly recommended that its work be followed by criminal prosecutions of particular individuals in a newly-constituted Extraordinary Criminal Court for Liberia that would be empowered 'to try all persons recommended by the TRC for the commission of gross human rights violations including violations of international humanitarian law, international human rights law, war crimes and economic crimes including but not limited to, killing, gang rape, multiple rape, forced recruitment, sexual slavery, forced labor, exposure to deprivation, missing, etc.'<sup>253</sup> The Commission recommended that 116 individuals from the NPFL, ULIMO-J, ULIMO-K, MODEL, LURD and other groups be prosecuted in this mechanism,<sup>254</sup> and even provided a draft statute for such a court.<sup>255</sup> Drawing lessons from the SCSL, this draft statute provides for appointment of judges

by the President of Liberia and the UN Secretary General, reserves a certain number of judicial appointments for women, and precluded appointment of those who participated in (or are perceived to have participated in) the conflicts.<sup>256</sup> This is to say that, despite the CPA's preference for resort to a TRC process rather than criminal trials, the Commission did not see its work as providing a full measure of justice to the victims of the conflict. Rather, it saw criminal prosecutions in cooperation with the international community as an advisable and necessary next step.

One may rightly ask: what has become of this recommendation since the issuance of the final TRC Report in December 2009? Unfortunately, no such Extraordinary Court has been established to adjudicate the atrocities outlined in the TRC report. Ozonnia Ojielo, the former Chief of Operations and Officer in Charge of the Sierra Leone Truth and Reconciliation Commission, and a consultant to the Liberia TRC, has offered several reasons for the lack of criminal prosecutions.<sup>257</sup> In general, the country's dismal civil, judicial and economic capacities, in the wake of nearly twenty years of civil strife, conspire against widespread formal prosecutions. From a criminal justice standpoint, many of the nation's jurists fled and the actual physical infrastructure of the justice system was destroyed during the conflict. In essence, there are few courts in which to hold prosecutions and few judges or lawyers to staff them. From a civil standpoint, the lack of strong governmental control outside of the capital, the history of organized oppression and persistent ethnic tensions undermine the national government's ability to engage in potentially divisive criminal prosecutions. Lastly, in light of the country's tenuous economic situation, the government has declared criminal prosecutions to be of a lesser priority than simply reconstituting Liberia as a functional state.

This economic concern is essentially a recasting of the familiar criticism of the expense of administering the ICTR and SCSL from a prospective position. In the cases of the ICTR and SCSL, the decision to expend great sums of money prosecuting relatively few defendants was criticized afterward as being a misallocation of resources away from projects and programmes that could provide more benefit to the post-conflict society. In the case of Liberia, the need to rebuild the country through exactly those types of projects and programmes had been used as a reason for not undertaking the expenditure of resources on criminal prosecutions in the first place. In either event, the limited resources available to the national and international authorities have created the perception of an either/or competition between criminal proceedings and other laudable public projects.

### *Impunity and “Victor’s Justice”*

The Liberian situation differs from the situation in Rwanda, and to a much lesser degree that of Sierra Leone, inasmuch as there was no clear ‘victor’ in the conflict. The CPA represents a political settlement between the warring factions that forestalled ultimate military conquest, and thus precluded the possibility that post-conflict mechanism would focus on the vanquished.

In and of itself, this political compromise does not necessarily mean that some or ‘all sides’ of the conflict could not be subjected to an equal measure of justice in proportion to their wartime atrocities. In practice, however, the post-conflict governments contained members of all of the warring factions, and thus as a pragmatic political matter no group was incentivized to seek prosecutions against another group (lest they themselves be subjected to similar calls).<sup>258</sup> Thus despite the TRC’s recommendation that criminal prosecutions to adjudicate conduct during the conflict, the political reality is such that these recommendations are unlikely to be seriously considered. None of those in power, including President Ellen Johnson Sirleaf, is keen to prosecute. This may not be surprising given that she and many other prominent individuals were named in the TRC Report for giving early support to those who fomented the war, such as Taylor.

This political impasse highlights a somewhat perverse aspect of the much-maligned notion of ‘victor’s justice’. From Nuremberg to Kigali, the charge that one side of a conflict enjoyed impunity for their conduct necessarily acknowledges that the other side did not enjoy such impunity. If a modicum of justice is better than no justice at all (which is not a given), the fact that there is a victorious side interested in pursuing its own interests, and capable of doing so, does mean that at least some justice will be meted out. Where no party enjoys such a position of authority, and no one has decisively won the war, it appears unreasonable to expect that leaders will fall on their swords out of a shared sense of legal rectitude.

### *Lessons From Earlier Situations*

The situation in Liberia, which in many ways parallels that in Sierra Leone, differs from those discussed above inasmuch as no ad hoc, internationalized, hybrid or other international court has been created to deal with the reputable claims of mass atrocities in the country’s fourteen years of civil war.<sup>259</sup> What lessons learned from the experience at the ICTR and the SCSL can be brought to bear in post-war Liberia?

First, the slow pace, high cost and exhausted political will at the ad hoc tribunals, as well as the subsequent entry into force of the ICC’s Rome



Statute, make the establishment of a dedicated special ad hoc criminal tribunal for Liberia a very unlikely possibility.<sup>260</sup> In this regard, even if there were the domestic political will in the Sirleaf government to call for criminal accountability supported by the international community, it is unclear whether it would obtain UN support which for the most part is focused on advancing developmental and peacebuilding goals in Liberia. What might give better results is a bilateral approach, say with the support of the US or the AU, to create such a special court for Liberia. Such a position would accord with US interest in advancing ad hoc courts as alternatives to full-fledged international tribunals as it proposed with respect to Sudan and more recently the Democratic Republic of Congo. In terms of the AU, the creation of a special chamber in the national courts of Senegal to prosecute former Chadian president Hissène Habré might serve as a blue print for a similar effort in relation to Liberia. Yet, given the limitations of funding, such an undertaking would likely require the financial support of African states as well as other, more affluent ones further afield.

Second, it is true that the broader international community did, in fact, agree to establish the permanent ICC in the years after the creation of the ad hocs. The Rome Statute provides the ICC with jurisdiction over four crimes: genocide,<sup>261</sup> crimes against humanity,<sup>262</sup> war crimes<sup>263</sup> and aggression.<sup>264</sup> 'The crimes committed in Liberia include at least two (crimes against humanity and war crimes), and possibly a third (genocide), of the four within the ICC's jurisdiction.'<sup>265</sup> Further, Liberia is a party to the Rome Statute, signing in 1998 and ratifying in September 2004. However, the temporal jurisdiction of the ICC is limited to those crimes committed after the entry into force of the Rome Statute, namely on 1 July 2002. Many, if not most, of the atrocities in Liberia were committed prior to the entry into force, and accordingly, the ICC Prosecutor would be limited to seeking justice for a fraction of those who were affected by the war.

Third, the experience with the SCSL could be duplicated in neighbouring Liberia. This hybrid model that uses elements of both international and domestic justice systems was also employed in East Timor, Kosovo and Cambodia following the establishment of the ICTs in the early 1990s. However, part of the theory of creating a hybrid tribunal is to allow the international system to piggyback to a certain degree on the national institutions. As such, creation of a hybrid court or a special chamber in the national courts of Liberia 'would require that there be at least an effectively functional and adequately resourced judicial system' beyond what currently exists in the country.<sup>266</sup> As we have seen with the SCSL (above in Part V), the resources necessary to create such a hybrid tribunal, as well as to do some necessary capacity-building at

the national level, do not come easily whether due to lack of political will or otherwise.

## Conclusion

Throughout this paper, we have argued that the form and structure of a criminal justice mechanism must be assessed on its merits relative to a specific situation. Simply put, it should be self-evident there is no one-size-fits-all approach to post-conflict criminal justice. The nature of a mechanism necessarily depend on the nature of each situation, the scope of the conflict, the character of the crimes at issue, as well as the extent of political will amongst those in government. Add to this the existence of a robust civil society interest in seeing some justice done.

In the main, by way of summary, we have assessed two post-conflict criminal justice mechanisms, those of the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone, on eight metrics: local involvement, competing national proceedings, competing international proceedings, impunity and victor's justice, breadth of the proceedings, quality of the proceedings, the cost of administering the mechanism and their jurisprudential impact. Notably, these are factors geared toward assessing the impact of the tribunals as legal entities, and therefore do not address their impact on economic development, public perceptions of justice, or many other laudable and necessary goals in a post-conflict society. Our goal has not been to compare those mechanisms with other presumed alternatives such as truth and reconciliation commissions. That said, as we conceded above, a thorough understanding of the impact of these criminal justice mechanisms on the maintenance of peace would likely require a ground-level empirical study.

The ICTR had several commendable aspects and several where it fell short of its high aspirations. In a positive light, the ICTR was a transformational approach to addressing post-conflict justice. International criminal law, functionally dormant since the end of World War II, was given a renewed lease on life, focused on bringing international fair trial standards to bear on some of the worst atrocities of the twentieth century. Unlike the International Military Tribunals in Germany and Tokyo, the ICTR indicted a variety of players whose actions were essential to the conduct of the genocide, to include military leaders, civilian leaders, politicians, local officials and media personalities. This broad view of the Tribunal's mandate serves as a beneficial guidepost for future efforts. The quality of the proceedings before the Tribunal was also largely consistent with international standards, arguably to the detriment of the court's pace and efficiency.

Several aspects of the ICTR, however, are perceived as less positive. First and foremost, the Tribunal had a strained relationship with the Rwandan government from its inception, which had a discernibly negative impact on the Tribunal's work. The Rwandan government was seemingly not fully invested after it lost a chance to influence the form the Tribunal took, and perceptions of the court's work in Rwanda have generally been that it is a foreign, remote, ponderously slow and expensive institution. To that end, Rwanda conducted many, many times more trials in their national courts and the specially-constituted gacaca courts than did the Tribunal. Perhaps a big strike against the ICTR is the charge of 'victor's justice'. The civil war that culminated in the 1994 genocide had been ongoing since at least 1990, and there is considerable evidence that the RPF committed atrocities during the conduct of the war against the genocidal Hutu regime. However, no RPF officials or soldiers were indicted by the Tribunal. On the other hand, domestic prosecutions of some of those alleged to be involved in key incidents were carried out by the Rwandese authorities. In the end, although this concern of the alleged victor's justice, much discussed in the literature, does not in our minds undermine its ultimate legacy, we may have to accept that there are additional pragmatic reasons why as such it might not have taken place. This is not unlike the type of one-sided justice that was dished out by the Nuremberg and Tokyo trials. It remains a matter on which history may well be the better judge.

Like the ICTR, the SCSL has a generally positive legacy. From a positive standpoint, the SCSL took the local challenges faced by the ICTR and ICTY seriously. As such, the Special Court took at least four significant steps toward involving the local community from its inception. First, the Court was located in Freetown, the locus criminis. Second, the Court was given jurisdiction over some violations of Sierra Leonean law, thus bringing it more in line with the local judiciary. Third, the Special Court undertook a serious outreach effort to inform the affected population. Fourth, a certain number of places within the Court's hierarchy were reserved specifically for Sierra Leoneans by the Statute, thus ensuring a floor for the level of local involvement. As a product of a treaty between the UN and the government of Sierra Leone, the hybrid international and national character of the Special Court addressed the sense of foreign justice common among the affected population in Rwanda (even if it did not eliminate such criticism entirely). The Special Court also took pains to indict parties from all sides of the conflict, and thus took a conscious step to avoid or diminish a charge of 'victor's justice'. The indictment, arrest and successful prosecution of the head of a neighbouring state, Charles Taylor of Liberia, and the resultant diminution of immunities, is another feather in the SCSL's cap. Lastly, and despite some tense exchanges, the experience in Sierra Leone provided a working example of how a national truth and reconciliation

commission could work in tandem with international (or internationalized) criminal proceedings. It also offered lessons on pitfalls to avoid wherever two such institutions are simultaneously used in the future, as they were in Sierra Leone.

From a more critical standpoint, the SCSL was created with a narrow (and apparently vague) mandate to try those ‘bearing greatest responsibility’ for the crimes at issue. The effort to define and implement that restriction took up a considerable amount of the Court’s energy and ultimately resulted in a scant few trials actually taking place at the SCSL. As such, the breadth of the proceedings suffered. The situation in Sierra Leone also demonstrated one of the problems in relying on local authorities to prosecute the bulk of the crimes committed during a conflict. This assumption, which undergirds the Rome Statute system, may be a false one premised on the affected state having the capacity and political will to prosecute. That, as we have seen, is not always the case. Despite the generally positive outcome of the Sierra Leone TRC findings, and unlike the experience in Rwanda, there remain many perpetrators of atrocities who have seen neither the inside of the SCSL or a national court.

In closing, we highlight that neither court has received positive reviews for their cost efficiency. One may rightly question, as we do, whether the measure of justice should be done in dollars and cents. Notwithstanding, the ICTR’s expenditure of US\$1.75 billion and the SCSL’s expected cost of US\$257 million (with roughly equivalent per-defendant expenses) will likely be considered a chilling example in future negotiations over international justice.

## Notes

1. For a deeper discussion on the loaded meaning of the term ‘international community’, see Edward Kwakwa, 2008, ‘The international community, international law and the United States: three in one, two against one, or one and the same’, in Michael Byers and George Nolte eds, *United States Hegemony and the Foundations of International Law*, New York: Oxford University Press.
2. See Letter Dated March 6, 2002 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2002/246, Annex I, Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone.
3. Mirjan R. Damaska, 2008, ‘What is the point of international criminal justice?’, *Chicago-Kent Law Review* 83, p. 329.
4. Kimi L. King and James D. Meernik, 2011, ‘Assessing the impact of the ICTY: balancing international and local interests while doing justice’, in Bert Stewart et al., eds, *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, pp. 7, 12 (hereinafter ‘*The Legacy of the ICTY*’).

5. Janine Natalya Clark, 2011, 'The impact question: the ICTY and the restoration and maintenance of peace', in *the Legacy of the ICTY*, n4, pp. 55–81.
6. Erin Staub, 2006, 'Reconciliation after genocide, mass killing or intractable conflict: understanding the roots of violence, psychological recovery and steps toward a general theory', *Political Psychology* 27, pp. 867, 884.
7. For instance, Professor Clark interviewed subjects in Bosnia-Herzegovina who felt that proper justice would require 'economic opportunities and creation of jobs'. Clark, op. cit. n5 at 70. Nothing in the mandate of either the ICTR or SCSL would allow them to undertake large-scale employment or economic development initiatives, and thus would never be capable of delivering 'justice' within the above meaning by themselves.
8. See Clark, op. cit. n5 (arguing that only empirical studies can validate the high-minded claims of ICJ proponents).
9. Diane F. Orenlichter, 2010, *That Someone Guilty Be Punished*, New York: Open Society.
10. *Ibid.*, pp. 51–57.
11. *Ibid.*, pp. 72–79.
12. *Ibid.*, pp. 57–65.
13. Charles Jalloh, 2010, 'Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction', *Criminal Law Forum* 21, p. 1.
14. Victor Peskin, 2005, 'Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda', *Journal of Human Rights* 4, pp. 213, 214.
15. Damaska, op. cit. n3.
16. This is not to say, however, that we have to accept the wisdom of the decision that set the court's goals. Rather, it is to say that a court explicitly established to try thirty particular defendants cannot be held accountable for failing to prosecute 100 more.
17. SCSL Statute, Article 1-1.
18. See e.g., Xabier Agirre Aranburu, 2009, 'Prosecuting the most responsible for international crimes: dilemmas of definition and prosecutorial discretion', in *Protección Internacional de Derechos Humanos y Estado de Derecho*, Bogotá, Grupo Editorial Ibanez.
19. Charles Jalloh, 2013 'Prosecuting those bearing "greatest responsibility": the lessons of the Special Court of Sierra Leone', *Marquette University Law Review* 96, p. 863.
20. David Wippman, 2006, 'The Costs of International Justice', *American Journal of International Law* 100, p. 861.
21. David Scheffer, 1998, 'Challenges Confronting International Justice Issues', *New England International and Comparative Law Annual* 4, p. 1.
22. *Prosecutor v. Jean-Paul Akayesu*, Case no. ICTR-96-4-T, Judgment, para. 83 (2 October 1998).
23. *Ibid.* at paras 86–89.

24. *Ibid.* at para. 93.
25. *Ibid.*, Text of Accord, available at [https://peaceaccords.nd.edu/site\\_media/media/accords/Rwanda\\_Peace\\_Accord.pdf](https://peaceaccords.nd.edu/site_media/media/accords/Rwanda_Peace_Accord.pdf), accessed 27 July 2014.
26. *Ibid.* at para. 106.
27. *Ibid.* at para. 107.
28. Romeo Dallaire, 2004, *Shake Hands with the Devil: The Failure of Humanity in Rwanda*, Da Capo Press.
29. *Prosecutor v. Theoneste Bagosora*, Case No. ICTR-96-4-A, Judgment (14 December 2011).
30. Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda, U.N. Doc S/1999/1257 (15 December 1999); Organization of African Unity, International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events, *Rwanda: the preventable genocide*, IPEP, 2000.
31. *Ibid.* at para. 111.
32. S.C. Res. 955, U.N. Doc. S/RES/955 (8 November 1994).
33. UN Charter, Article 39.
34. Letter Dated 15 December 1999 from Members of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda Addressed to the Secretary-General, U.N. Doc. S/1999/1257, Annex I at 68 (16 December 1999).
35. S.C. Res. 925, U.N. Doc. S/RES/925 (8 June 1994).
36. Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935 (1994), para. 150, U.N. Doc. S/1994/1125 (4 October 1994).
37. U.N. Doc. S/PV.3453 (8 November 1994). The Chinese Government abstained from the vote, noting that it may be 'an incautious act' to proceed without the assent of Rwanda.
38. For more detailed analysis, see Payam Akhavan, 1996, 'The International Criminal Tribunal for Rwanda: the Politics and Pragmatics of Punishment', *American Journal of International Law* 90 (3), pp. 505–8.
39. U.N. Doc. S/PV.3453, at 14.
40. *Ibid.* at 15.
41. *Ibid.*
42. *Ibid.*
43. This concern may have been borne out by the experience with Georges Ruggiu, the only non-Rwandan convicted by the ICTR. Ruggiu, an Italian-Belgian journalist for Radio Television Libre des Milles Collines, received a twelve-year sentence in June 2000 after pleading guilty to direct and public incitement to genocide and persecution. In February 2008, Ruggiu was transferred to Italy to serve the remainder of his sentence. On 21 April 2009, he was released early by the Italian authorities despite the mandate in Article 27 of the ICTR statute giving the President sole authority to grant early release. See The Hague Justice Portal, Convicted journalist released early in violation of ICTR Statute,

- available at <http://www.haguejusticeportal.net/index.php?id=10688>, accessed 27 July 2014.
44. *Ibid.*
  45. *Ibid.* at 16.
  46. *Ibid.*
  47. *Jean-Bosco Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-T, Amended Indictment (14 April 2000).
  48. *Jean-Bosco Barayagwiza v. Prosecutor*, Decision (3 November, 1999), available at <http://unictr.org/Portals/0/Case/English/Barayagwiza/decisions/dcs991103.pdf>, accessed 27 July 2014.
  49. *Jean-Bosco Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration) (31 March 2000), available at <http://www.unictr.org/Portals/0/Case%5CEnglish%5CBarayagwiza%5Cdecisions%5Cdc20000331.pdf>, accessed 27 July 2014.
  50. Peskin, op. cit. n14 at 225.
  51. Prosecutor Carla Del Ponte told the Appeals Chamber that 'her ability to continue with prosecutions and investigations depends on the government of Rwanda and that, unless the Appellant is tried, the Rwandan government will no longer be 'involved in any manner'. Decision, op. cit. n.49 at para. 24; *see also* Transcript of the hearing on 22 February 2000, pp. 26–28; Decision, op. cit. n.49. Declaration by Judge Rafael Nieto-Navia at paras 11, 16 (rejecting Del Ponte's accusations of political bias as well as what he perceived as the Rwandan desire to see every indictee convicted).
  52. The first president of the ICTY, Antonio Cassese, famously described that court as 'a giant without arms and legs'. Cassese declared that the ICTY needed 'artificial limbs to walk and work. And these artificial limbs are state authorities. If the cooperation of states is not forthcoming, the ICTY cannot fulfill its functions. It has no means at its disposal to force states to cooperate with it'. Antonio Cassese, 1998, 'On current trends towards criminal prosecution and punishment of breaches of international humanitarian law', *European Journal of International Law* 9, p. 1.
  53. Statement by Hon. Tharcisse Karugarama, at the United Nations General Assembly, Thematic Debate on the Role of International Criminal Justice in Reconciliation (9 April 2013) available at <http://rwandaun.org/site/2013/04/10/statement-by-honourable-tharcisse-karugarama-minister-of-justice-and-attorney-general-of-rwanda/>, accessed 27 July 2014.
  54. *See* Part V, op. cit.
  55. Jalloh, 'Prosecuting those bearing "Greatest Responsibility"', op. cit. n.19.
  56. Nicholas A. Jones, 2010, *The Courts of Genocide: Politics and the Rule of Law in Rwanda and Arusha*, Abingdon: Routledge, pp. 91–93.
  57. Karugarama, op. cit. n. 53.
  58. The modern incarnation of *Gacaca* differs significantly from the pre-colonial form from which it takes its name. Notably, the prior incarnation dealt mainly with minor civil disputes and did not impose sentences of Imprisonment.



The modern analogue deals with ‘the crime of crimes’ and routinely gives out prison sentences. Amaka Megwalu and Neophytos Loizides, 2010 ‘Dilemmas of Justice and Reconciliation: Rwandans and Gacaca Courts’, *African Journal of International and Comparative Law* 18, pp. 4–5.

59. *Ibid.* at 3.
60. Karugarama, op. cit. n.53.
61. Anne N. Kubai, 2007, ‘Between Justice and Reconciliation: The Survivors of Rwanda’, *African Security Review* 16 (1), p. 60.
62. Jones, op. cit. n.56 at 94.
63. Scheffer, op. cit. n.21.
64. See e.g., Report on the completion strategy of the International Criminal Tribunal for Rwanda, U.N. Doc S/2008/322 (12 May 2008) (describing efforts to move cases to competent national jurisdictions); Erik Mose, 2008, ‘The ICTR’s Completion Strategy – Challenges and Possible Solutions’, *Journal of International Criminal Justice* 6 (4), p. 667.
65. Note that, many other countries, including the US and Canada also sought removal of those individuals allegedly involved in genocide from their jurisdictions pursuant to the exclusion clauses of the Refugee Convention. See e.g., Joseph Rikhof, 2006, ‘Complicity in International Criminal Law and Canadian Refugee Law’, *Journal of International Criminal Justice* 4, p. 702.
66. *R. v. Munyaneza* [2009] QCCS 2201; Fannie LaFontaine, 2010, ‘Canada’s Crimes against Humanity and War Crimes Act on Trial’, *Journal of International Criminal Justice* 8, p. 269.
67. Onesphore Rwabukombe, Oberlandesgericht Frankfurt am Main – Judgement of 18 February 2014 - reference number 5 - 3 StU 4/10 - 4 - 3/10.
68. Vincent Bajinya, Charles Munyaneza, Emmanuel Nteziryayo and Celestin Ugirashebuja. See *Brown vs. Government of Rwanda*, [2009] EWHC 770 (Admin).
69. Vincent Ntezimana, Alphonse Higaniro, Consolata Mukangango and Julienne Mukabutera: see (Unreported, Cour d’Assises de l’Arrondissement Administratif de Bruxelles-Capital, President Maes, Judges Louveaux and Massart, 8 June 2001), available at <http://www.asf.be/AssisesRwanda2/fr/>, accessed 27 July 2014; see also Mathias Bushishi, <http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/1073/action/show/controller/Profile.html>, accessed 27 July 2014; Etienne Nzabonimana, <http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/327/action/show/controller/Profile.html>, accessed 27 July 2014; Samuel Ndashyikirwa, <http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/328/action/show/controller/Profile.html>, accessed 27 July 2014.
70. *Prosecutor vs. Sadi Bugingo*, TOSLO-2012-106377, Oslo District Court (15 February 2013), available at <http://www.asser.nl/upload/documents/20130226T095633-Oslo%20District%20Court%20judgment%2014-02-2013%20Norwegian.pdf>, accessed 27 July 2014.
71. Wenceslas Munyeshyaka, Rectification, Cass. Crim., No. 96-82491, (10 February 1998), available at <http://www.asser.nl/upload/documents/20120612T111630->

- Cour\_de\_Cassation\_Chambre\_criminelle\_du\_10\_f%C3%A9vrier\_1998.pdf.
72. Fatou Bensouda, 2013, 'International criminal justice in Africa – the state of play', in Southern African Litigation Centre, *International Criminal Justice and Africa*, pp. 24–26 ('Save for the hybrid SCSL and Rwanda, African states have not for the most part been active in prosecuting international crimes domestically – despite ample opportunities to do so').
  73. See Karugarama, op. cit. n.53; H. E. President Paul Kagame, Statement to UN General Assembly 68th Session (25 September 2013), available at <http://gadebate.un.org/68/rwanda>.
  74. See e.g., Trial Materials, Theoneste Bagosora v. Prosecutor, ICTR-96-7 (<http://unictr.org/tabid/128/Default.aspx?id=10&mnid=4>); Trial Materials, Jean Kambanda v. Prosecutor, ICTR-97-23 (<http://unictr.org/tabid/128/Default.aspx?id=24&mnid=4>); Trial Materials, Jean-Bosco Uwinkindi v. Prosecutor, ICTR-01-75 (<http://unictr.org/tabid/128/Default.aspx?id=75&mnid=7>); Trial Materials, Ferdinand Nahimana v. Prosecutor, ICTR-99-52 (<http://unictr.org/tabid/128/Default.aspx?id=29&mnid=4>).
  75. Hassan B. Jallow, 2005, 'Prosecutorial discretion and International Criminal Justice', *Journal of International Criminal Justice* 3, p. 145 (arguing that 'The primary targets for prosecution inevitably are therefore the political, administrative and military leadership at the time, which planned and oversaw the execution of the genocide. Any level of participation by any such persons is thus sufficient to bring them within the category of those to be prosecuted').
  76. At present, the ICTR has nine accused for which indictments have been issued who remain at large. See 'Accused at Large', <http://unictr.org/Cases/tabid/77/Default.aspx?id=12&mnid=12>, accessed 27 July 2014.
  77. The Prosecutor of the ICC has brought cases against Thomas Lubanga Dyilo, Germain Katanga, Bosco Ntaganda, Callixte Mbarushimana, Sylvestre Mudacumura, and Mathieu Ngudjolo Chui for crimes committed or allegedly committed in the Democratic Republic of Congo, for instance. See [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/Pages/situation%20index.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/Pages/situation%20index.aspx), accessed 27 July 2014.
  78. See e.g., 'Letter to the Prosecutor of the International Criminal Tribunal for Rwanda Regarding the Prosecution of RPF Crimes', Human Rights Watch (26 May 2009), <http://www.hrw.org/node/83536>, accessed 27 July 2014; Lars Waldorf, 2010, 'A mere pretense of justice': complementarity, sham trials, and victor's justice at the Rwanda tribunal', *Fordham University International Law Journal* 33 (4), pp. 1221–77.
  79. UN Commission of Experts, Final Report, U.N. Doc. S/1994/1405 (9 December 1994); Peskin, op. cit. n.14 at 216.
  80. See, in this regard, Carla Del Ponte, 2009, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity. A Memoir*, Other Press, pp. 231–39.
  81. Peskin, op. cit. n.14 at 226. For further criticisms by academics, see Filip Reyntjens, 2013, *Political Governance in Post-Genocide Rwanda*, Cambridge

- University Press, p. 244; Luc Cote, 'The exercise of prosecutorial discretion in international criminal law', *Journal of International Criminal Justice* 3, pp. 176–77.
82. United States Department of State, Diplomatic Cable, ICTY: President Meron urges USG to oppose Del Ponte renewal, 17 July 2003, 03THEHAGUE1827\_a.
  83. William A. Schabas, 'Selecting cases at the ICTR', in Charles Jalloh and Alhagi Marong, eds, 2014, *Promoting Accountability for Gross Human Rights Violations in Africa Under International Law: Essays in Honour of Prosecutor Hassan B. Jallow*, Leiden: Brill Publishing.
  84. *Ibid.* at 222.
  85. *Ibid.*
  86. Goldstone also stated, in the context of the ICTY, that he would issue indictments against Bosniak Muslims 'for the sake of saying ... what an even-handed chap I am.' *Ibid.*
  87. UN Doc. S/PV.5904 (4 June 2008).
  88. See, U.N. SCOR, 64th Sess., 6134th mtg. at 33, U.N. Doc. S/PV.6134 (4 June 2009).
  89. See Human Rights Watch, 'Rwanda: tribunal risks supporting 'victor's justice': tribunal should vigorously pursue crimes of Rwandan Patriotic Front' (1 June 2009), available at <http://www.hrw.org/news/2009/06/01/rwanda-tribunal-risks-supporting-victor-s-justice>, accessed 27 July 2014.
  90. See e.g., UN Commission of Experts, Final Report, U.N. Doc. S/1994/1405 (9 December 1994).
  91. ICTR Statute, Article 1.
  92. ICTR Statute, Article 2.
  93. ICTR Statute, Article 3.
  94. ICTR Statute, Article 4.
  95. At the same time, the limited mandate created the somewhat perverse situation where significant international attention was focused on acts committed in basically 100 days in one small geographic area while, at the same time, serious violations of international law were ongoing in neighbouring countries. The Tribunal was simply not empowered to bring peace to the entire region; the Prosecutor was as unable to bring charges related to fresh atrocities in DRC as anyone else.
  96. UN ICTR, Status of Cases, <http://unictr.org/Cases/tabid/204/Default.aspx>, accessed 27 July 2014.
  97. Charles Jalloh, 2011, 'Special Court for Sierra Leone: Achieving Justice?', *Michigan Journal of International Law* 32, p. 395.
  98. See, Rules of Procedure and Evidence, <http://unictr.org/Legal/RulesofProcedureandEvidence/tabid/95/Default.aspx>, accessed 27 July 2014.
  99. In a partially dissenting opinion in the Government II case, for instance, Judge Emil Short found that 'the Accused have been incarcerated without judgment for more than 12 years' and concluded that 'the right to trial without undue delay has been violated'. Judge Short suggested a reduction in sentence for the

- convicted defendants would be appropriate as a result. *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Judgment and Sentence, p. 548 (30 September 2011). On appeal, Judge Patrick Robinson found that the nearly three years it took to prepare the trial judgement also breached the right to trial without undue delay. *Mugenzi & Mugiraneza v. Prosecutor*, Case No. ICTR-99-50-A, Judgement, p. 262 (4 February 2003).
100. As noted in the introductory section, 'expensive' is a relative term.
  101. S. Ford, 2011, 'How leadership in international criminal law is shifting from the United States to Europe and Asia: an analysis of spending on and contributions to international criminal courts', *Saint Louis University Law Journal* 55, p. 973.
  102. The ICTR completed 47 cases, had 16 on appeal and 12 acquittals as of July 2014, a total of 75, see <http://www.unict.org/Cases/StatusofCases/tabid/204/Default.aspx>.
  103. Eric Posner, 2009, *The Perils of Global Legalism*, Chicago: University of Chicago Press.
  104. See, Part V, op. cit.
  105. 78 U.N.T.S. 227 (9 December 1948).
  106. M. Cherif Bassiouni, 2008, *International Criminal Law 3rd. Edition*, Leiden: Brill, p. 112.
  107. *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, Judgement (2 September 1998).
  108. *Ibid.* at para. 731–33.
  109. See ICTR Statute, Article 6 (2); Bassiouni, op. cit. n.106 at 113. This is also a feature of the ICTY, ICC and SCSL Statutes.
  110. Bassiouni, op. cit. n.106 at 114.
  111. See *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence (15 May 2003). Larissa van den Herik, 2005, *Contribution of the Rwanda Tribunal to the Development of International Law*, Leiden: Brill; George Mugwanya, 2007, *The Crime of Genocide in International Law: Appraising the Contribution of the UN Tribunal for Rwanda*, Cameron; Erik Mose, 2005, 'Main achievements of the ICTR', *Journal of International Criminal Justice* 3, p. 920.
  112. UN Security Council, Report of the Secretary General on the establishment of a Special Court for Sierra Leone, S/2000/915 (4 October 2000) (addressing relationship between new SCSL and existing ad hoc tribunals); SCSL Statute, Article 14 (inheriting Rules of Procedure and Evidence from ICTR mutatis mutandi), Article 19 (looking to ICTR for guidance on sentencing), Article 20 (looking to ICTR and ICTY appellate decisions).
  113. J.R. Cartwright, 1970, *Politics in Sierra Leone: 1947–1967*, Toronto: University of Toronto Press, p. 4.
  114. Sierra Leone Truth and Reconciliation Commission, Report of the Commission Executive Summary, Vol. 2, Chapter 1, available at [http://www.sierraleonecrtc.org/index.php/view-the-final-report/download-table-of-contents/volume-two/item/witness-to-the-truth-volume-two-chapter-1?category\\_id=12](http://www.sierraleonecrtc.org/index.php/view-the-final-report/download-table-of-contents/volume-two/item/witness-to-the-truth-volume-two-chapter-1?category_id=12), accessed 27 July 2014.

115. *Ibid.*
116. *Ibid.*
117. See, L. Gberie, 2006, *A Dirty War in West Africa: The RUF and the Destruction of Sierra Leone*, Bloomington: Indiana University Press; D. Keen, 2006, *Conflict and Collusion in Sierra Leone*, Basingstoke: Palgrave MacMillan.
118. Taylor started a guerrilla war in Liberia in 1989 similar to that led by Sankoh in Sierra Leone. He served as Liberia's President from 1997 to 2003.
119. Peace Agreement between the Government of Sierra Leone and the Revolutionary Armed Front of Sierra Leone (18 May 1999), available at <http://www.sierraleonetrc.org/downloads/legalresources/lomepeaceaccord.pdf>, accessed 27 July 2014. Hereinafter 'Lomé Accords'.
120. Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 2178 U.N.T.S. 127 (16 January 2002). Hereinafter 'SCSL Agreement'.
121. President of the Republic of Sierra Leone, Annex to the Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2000/786 (10 August 2000).
122. *Ibid.*
123. S.C. Res. 1315, U.N. Doc. S/RES/1315 (14 August 2000).
124. Antonio Cassese, 'Independent Expert Report on the Special Court for Sierra Leone' (12 December 2006), available at <http://www.rscsl.org/Documents/Cassese%20Report.pdf>; Alison Smith, 2014, 'The expectations and role of international and national civil society and the SCSL', in Charles Jalloh, ed., *The Sierra Leone Special Court and Its Legacy*, New York: Cambridge University Press, p. 46. Hereinafter '*Sierra Leone Special Court Legacy*'.
125. See e.g., Ralph Zacklin, 2004, 'The failings of ad hoc international tribunals', *International Criminal Justice*, 2, pp. 541–44 (arguing that there was a perception among the victims that the ICTY was too remote and that there was little appreciation of its work at the grass roots level); Karugarama, op. cit. n.53 (arguing that the Tribunals were 'viewed as foreign, detached and contribute very little to National reconciliation process').
126. David M. Crane, 2005, 'Dancing with the devil: prosecuting West Africa's warlords: building initial prosecutorial strategy for an international tribunal after third world armed conflicts', *Case Western Reserve University Journal of International Law* 37, p. 1.
127. *Ibid.*
128. See e.g., Lydia A. Nkansah, 2014, 'Justice within the arrangement of the Special Court for Sierra Leone versus local perception of justice: a contradiction or harmonious?', *African Journal of International and Comparative Law* 22, p. 115 (reviewing a field study of attitudes amongst ordinary Sierra Leoneans about the Special Court).
129. SCSL Agreement, op. cit. n.120, Articles 2,3,7.
130. *Ibid.*, Article 2.
131. Smith, op. cit. n.124.

132. Antonio Cassese, 2004, 'The role of internationalized courts and tribunals in the fight against international criminality', in Cesare P.R. Romano, Andre Nollkaemper, and Jann K. Kleffner eds, *Internationalized Criminal Courts Sierra Leone, East Timor, Kosovo, and Cambodia*, New York: Oxford University Press; Laura A. Dickinson, 2003, 'The promise of hybrid courts', *American Journal of International Law* 97, p. 295.
133. Jalloh, op. cit. n.97.
134. Vincent Nmeihille and Charles Jalloh, 2006, 'The legacy of the Special Court for Sierra Leone', *Fletcher Forum of World Affairs* 30, p. 107; Outreach and Public Affairs, available at <http://www.rscsl.org/OPA.html>; Stuart Ford, 'How special is the Special Court's outreach section?', in *Sierra Leone Special Court Legacy*, op. cit. n.124 at 505.
135. Nmeihille and Jalloh, op. cit. n.134.
136. Damaska, op. cit. n.3.
137. Lomé Accords, op. cit. n.119, Article VI.
138. The Truth and Reconciliation Commission Act of 2000, available at [http://www.sierraleonetr.com/downloads/legalresources/trc\\_act\\_2000.pdf](http://www.sierraleonetr.com/downloads/legalresources/trc_act_2000.pdf), accessed 27 July 2014. Hereinafter 'TRC Act'.
139. Lomé Accords, Article IX.
140. William A. Schabas, 2004, 'Truth commissions and courts working in parallel', *American Society of International Law and Procedure* 93, p. 189–91.
141. Linda E. Carter, 'International judicial trials, truth commissions, and *Gacaca*: developing a framework for transitional justice from the experiences in Sierra Leone and Rwanda', in *Sierra Leone Special Court Legacy*, op. cit. n.124 at 728.
142. *Prosecutor v. Norman*, Case No. SCSL-2003-08-PT-122, Decision on appeal by TRC and accused against the decision of His Lordship Justice Bankole Thompson to deny the TRC request to hold a public hearing with Chief Norman (28 November 2003), available at <http://www.rscsl.org/Documents/Decisions/CDF/Appeal/122/SCSL-03-08-PT-122.pdf>.
143. Sierra Leone Truth & Reconciliation Commission, 2004, *2 Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission* 1, p. 190.
144. *S v Kallay and Others*, [2006] SLHC 7 (5 April 2006).
145. *Ibid.*
146. See Letter from President Alhaji Ahmad Tejan Kabbah to the United Nations Secretary-General dated 12 June 2000, available at <http://www.rscsl.org/Documents/Establishment/S-2000-786.pdf>, accessed 27 July 2014.
147. See 'Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone', op. cit. n.2.
148. Charles Jalloh, 'Conclusion', in *Sierra Leone Special Court Legacy*, op. cit. n.124 at 770.
149. See Superseding Indictment, United States v. Roy M. Belfast, Jr., Case No. 06-20758-CR-ALTONAGA(s), (S.D. Fl., 10 September 2007), available at <http://www.justice.gov/criminal/hrsp/pr/2007/september/09-06-07ctaylor-indict.pdf>, accessed 27 July 2014.

150. Lansana Gberie, 2005, *A Dirty War in West Africa: The RUF and the Destruction of Sierra Leone*, Indiana University Press Press; Yusuf Bangura, 2001, 'Strategic policy failure and governance in Sierra Leone', *Journal of Modern African Studies* 38 (4), p. 551.
151. Foday Saybana Sankoh, Sam Bockarie, Issa Hassan Sesay and Morris Kallon.
152. Alex Tamba Brima, Ibrahim Bazzay Kamara, Santigie Borbor Kanu and Johnny Paul Koroma.
153. Sam Hinga Norma, Moinina Fofana and Allieu Kondewa.
154. SCSL Statute, Article 1.
155. Jalloh, op. cit. n.97.
156. Lansana Gberie, 'The civil defense forces trial: limit to international justice?' in *Sierra Leone Special Court Legacy*, op. cit. n. 124 at 624; Charles Jalloh, 'Prosecuting those bearing "greatest responsibility": the contributions of the special court for Sierra Leone', in *Sierra Leone Special Court Legacy*, op. cit. n.124 at 589; Jalloh, op. cit. n.97.
157. Jalloh, op. cit. n.97.
158. For instance, some international commentators have called for the arrest of Ibrahim Bah, an associate of Charles Taylor accused of, *inter alia*, supplying arms to the conflict. See Centre for Accountability and Rule of Law, CARL Calls for the Prosecution of former mercenary in the Sierra Leone Civil Conflict (13 June 2013), available at <http://www.carl-sl.org/home/press-releases/613-ibrahim-tommy-executive-director-carl>, accessed 27 July 2014; Human Rights Watch, Sierra Leone: Investigate Alleged Rebel Arms Supplier (19 June 2013) available at <http://www.hrw.org/news/2013/06/19/sierra-leone-investigate-alleged-rebel-arms-supplier>, accessed 27 July 2014.
159. SCSL Statute, Article 2.
160. *Ibid.* at Article 3.
161. *Ibid.* at Article 4.
162. *Ibid.* at Article 5.
163. Abdul Tejan Cole, 2001, 'The Special Court for Sierra Leone: conceptual concerns and alternatives' 1, p. 107.
164. SCSL Statute, Article 1 (1). Those persons must also have been over the age of 15 at the time of the alleged crime. SCSL Statute, Article 7.
165. *Ibid.*
166. ICTR Statute, Article 1.
167. SCSL Statute, Article 1(1).
168. For more detailed analysis and legal history, see Charles Jalloh, 'Prosecuting those bearing "greatest responsibility": the contributions of the Special Court for Sierra Leone', in *Sierra Leone Special Court Legacy*, op. cit. n.124 at 589.
169. The Special Court also heard several contempt cases related to the primary proceedings.
170. See <http://www.rscsl.org/Documents/RPE.pdf> (showing amendment dates of all prior versions of the RPE).
171. SCSL Agreement, op. cit. n.120, Articles 2,3.
172. SCSL RPE, Rule 72 (iii).



173. Jalloh, op. cit. n.97 at 456.
174. SCSL Statute, Article 1.
175. Jalloh, op. cit. n.173 at 413.
176. *Prosecutor v. Fofana*, Case No. SCSL-04-14-T, Judgement, paras 91–92 (2 August 2007).
177. *Ibid.* at para. 92.
178. *Prosecutor v. Brima*, Case no. SCSL-04-16-T Judgement, para. 653 (20 June 2007).
179. *Ibid.*
180. *Ibid.* at para. 654.
181. *Prosecutor v. Brima*, Case no. SCSL-04-16-A, Appeals Judgement, para. 281 (22 February 2008).
182. See, Jalloh op. cit. n.173 at 415–30.
183. David M. Crane, 2006, ‘International criminal tribunals in the 21<sup>st</sup> century: terrorists, warlords, and thugs’, *American University International Law Review* 21, pp. 508–9, 511–12.
184. Phoebe Knowles, 2006, ‘The power to prosecute: the Special Court for Sierra Leone from a defence perspective’, *International Criminal Law Review* 6, pp. 406–7.
185. Human Rights Watch, 2004, ‘Bringing justice: the Special Court for Sierra Leone: accomplishments, shortcomings and needed support’, 8 September), available at <http://www.hrw.org/reports/2004/09/07/bringing-justice-special-court-sierra-leone>, accessed 27 July 2014.
186. Jalloh, op. cit. n.173 at 424.
187. International Covenant on Civil and Political Rights, arts. 9(3), 14, 999 U.N.T.S 171 (March 23, 1976).
188. SCSL Statute, Article 17.
189. SCSL RPE, Article 45.
190. Jalloh op. cit. n.173 at 442.
191. *Ibid.* at 444 (citing Wayne Jordash and Scott Martin, 2010, ‘Due process and fair trial rights at the Special Court: how the desire for accountability outweighed the demands of justice at the Special Court for Sierra Leone’, *Leiden Journal of International Law* 23, pp. 587, 608.
192. ICTR Statute, Article 30; ICTY Statute, Article 32.
193. S. Ford, 2011, ‘How leadership in international criminal law is shifting from the United States to Europe and Asia: an analysis of spending on and contributions to international criminal courts’, *Saint Louis University Law Journal* 55, pp. 975–76.
194. In practical terms, the SCSL has completed trials for only nine individuals. *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-04-16-T; *Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-T; *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-T.
195. Would that \$5,000,000 could be called ‘trivial’ in our everyday lives. However, the expenditure-per-defendant metric does not take into account many

- economic factors that may be important to an overall calculation. Thus, it is a rough measure of a rough estimate, and as such, the resultant numbers are not specific enough to warrant one-to-one scrutiny.
196. See, Helena Cobban, 2006, 'International courts', *Foreign Policy*, March-April, pp. 22–23 (noting that the ICTs had 'ballooning' timelines and costs).
  197. S.C. Res 1315 (2000) para.8; SCSL Agreement, op. cit. n.120, Article 6.
  198. SCSL Agreement, op. cit. n.120, Article 7.
  199. Sara Kendall, 'Marketing accountability at the Special Court for Sierra Leone', in *Sierra Leone Special Court Legacy*, op. cit. n.124 at 389.
  200. Stephen Rapp, 2009, 'The compact model in international criminal justice: the Special Court for Sierra Leone', *Drake University Law Review* 57, pp. 11–48.
  201. Jalloh op. cit. n.173 at 430.
  202. U.N. Secretary General, Letter dated 12 January 2001 from the Secretary General to the President of the Security Council, para.12, U.N. Doc. S/2001/40 (12 January 2001).
  203. Jalloh op. cit. n.173 at 435.
  204. Notably, the SCSL had to be rescued financially by the UN in 2004, after its voluntary funding mechanism failed to provide sufficient funding to support the Court's on-going work. Stuart Ford, 2011, 'How leadership in international criminal law is shifting from the United States to Europe and Asia: an analysis of spending on and contributions to international criminal courts', *Saint Louis University Law Journal* 55, p. 993.
  205. Human Rights Watch, op. cit. n.185, at 4–6.
  206. The Special Court for Sierra Leone, First Annual Report of the President of the Special Court for Sierra Leone for the Period 2 December 2002–1 December 2003, at 27.
  207. Cesare P.R. Romano, 2005, 'The price of international justice', *Law and Practice International Courts and Tribunals* 4, pp. 304–5. See also Jalloh op. cit. n.173 at 437–44 (describing in detail various implications for the defendants and Defense Office as a result of 'shoestring' funding).
  208. The Special Court for Sierra Leone, Fifth Annual Report of the President of the Special Court for Sierra Leone for the Period June 2007–May 2008, p. 11 (documenting numerous fundraising trips to world capitals); The Special Court for Sierra Leone, Sixth Annual Report of the President of the Special Court for Sierra Leone for the Period June 2008–May 2009 (noting that the global financial crisis had increased the difficulty of fundraising from voluntary donors).
  209. Kendall, op. cit. n.199 at 393–99.
  210. See Micaela Frulli, 'Piercing the veil of head-of-state immunity: the Taylor trial and beyond', in *Sierra Leone Special Court Legacy*, op. cit. n.124 at 325.
  211. *Prosecutor v. Charles Taylor*, SCSL Case no. SCSL-03-01-PT, Second Amended Indictment (29 May 2007), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=lrn0bAAMvYM%3d&tabid=107>, accessed 27 July 2014.

212. In particular, the defence cited case concerning arrest warrant of 11 April 2000 (*Democratic Republic of Congo v. Belgium*) 2002 I.C.J. 1 (14 February) (commonly, 'Yerodia').
213. Special Court for Sierra Leone, *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-1-T, Appeals Chamber, Decision on Immunity from Jurisdiction (31 May 2004); Sarah Nouwen, 2005, 'The Special Court for Sierra Leone and the immunity of Taylor: the arrest warrant case continued', *Leiden Journal of International Law* 18 (2), p. 645; Zsuzsanna Deen-Racsmany, 2005, 'Prosecutor v. Taylor: the status of the Special Court for Sierra Leone and its implications for immunity', *Leiden Journal of International Law* 18 (3), p. 229; Charles Jalloh, 2004, 'Immunity from prosecution for international crimes: the case of Charles Taylor at the Special Court for Sierra Leone', *ASIL Insights* 8, p. 21.
214. Decision on Immunity from Jurisdiction, op. cit. n.213 at para. 59.
215. *Ibid.* at paras 50–53.
216. *Ibid.* at paras 39–42.
217. Frulli, op. cit. n.210 at 328.
218. Alison Smith, 2004, 'Child recruitment and the Special Court for Sierra Leone', *Journal of International Criminal Justice* 2 (4), p. 1141; Cecil Aptel, 'Unpunished crimes: the Special Court for Sierra Leone and children', in *Sierra Leone Special Court Legacy*, op. cit. n.124 at 340.
219. Noah Benjamin Novogrodsky, 'After the horror: child soldiers and the Special Court for Sierra Leone', in *Sierra Leone Special Court Legacy*, op. cit. n.124 at 361.
220. *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Appeals Chamber, Decision on Preliminary Motion Based on Lack of Jurisdiction (31 May 2004).
221. This term has been highly contentious. It is used here not to endorse any particular interpretation, but as a restatement of the wording used by the Special Court.
222. Michael P. Scharf, 'Forced marriage as a separate crime against humanity', in *Sierra Leone Special Court Legacy*, op. cit. n. 124 at 193; Valerie Oosterveld, 2011, 'Forced Marriage and the Special Court for Sierra Leone: legal advances and conceptual difficulties', *Journal of International Humanitarian Law Studies* 2 (1), p. 127; Patricia Sellers, 2011, 'Wartime female slavery: enslavement?', *Cornell International Law Journal* 44, p. 115.
223. *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Judgement, para. 168 (2 March 2009).
224. *Prosecutor v. Brima, Kamara and Kanu*, Case no. SCSL-03-06-T, Judgement, para. 174 (20 June 2007).
225. *Prosecutor v. Brima, Kamara and Kanu*, Case no. SCSL-03-06-A, Judgment, para.195 (22 February 2008).
226. See Nicholas A. Goodfellow, 2011, 'The miscategorization of "forced marriage" as a crime against humanity by the Special Court for Sierra Leone', *International Criminal Law Review* 11, p. 848–53; Sidney Thompson, 'Forced marriage at the Special Court for Sierra Leone: questions of jurisdiction, legality, specificity,

- and consistency, in *Sierra Leone Special Court Legacy*, op. cit. n.124 at 215.
227. Simon M. Meisenberg, 2004, 'Legality of amnesties in international humanitarian law: the Lomé Amnesty Decision of the Special Court for Sierra Leone', *International Review of Red Cross* 86, p. 856.
228. Lomé Accords at Article IX.
229. SCSL Statute, Article 10.
230. *Prosecutor v. Kallon & Kamara*, Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), Decision on Challenged to Jurisdiction: Lomé Accord Amnesty, para. 3 (13 March 2004).
231. Leila Nadya Sadat, 'The Lomé amnesty decision of the Special Court for Sierra Leone', in *Sierra Leone Special Court Legacy*, op. cit. n.124 at 311, 323; But see also William Schabas, 2005, 'Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone', *U.C. Davis Journal of International Law and Policy* 11, p. 145 (criticizing the SCSL's decisions on the applicability of the amnesty provision because, *inter alia*, they were too absolute and went beyond existing law).
232. See Truth and Reconciliation Commission of Liberia, *Final Report: Volume One*, pp. 49–50.
233. Ozonnia Ojielo, 2010, 'Critical lessons in post-conflict security in Africa: the case of Liberia's Truth and Reconciliation Commission', *Institute for Justice and Reconciliation in Africa Programme*, Occasional Paper 1, p. 3.
234. Truth and Reconciliation Commission of Liberia, *Final Report: Volume Two*, at 144.
235. *Ibid.* at 144–49.
236. Ojielo, op. cit. n.233 at 3.
237. TRC Final Report Vol. 2 at 152–53.
238. *Ibid.*
239. TRC Final Report Vol. 2 at 157–58.
240. 2004 Witness to Truth: Report of the Truth and Reconciliation Commission of Sierra Leone, 3A.
241. Notably, ULIMO itself was fractionalized on ethnic grounds. ULIMO-J was composed primarily of ethnic Krahn loyal to General Roosevelt Johnson. ULIMO-K was composed mostly of ethnic Mandingos loyal to Alhaji Kromah. *Ibid.* at 3.
242. Taylor's National Patriotic Party cleared more than 75 per cent of the votes. See International Foundation for Electoral Systems, Final Results of Liberia's 1997 Elections, available at [http://www.ifes.org/-/media/Files/Publications/Election%20Results%20Evaluation%20of/1997/835/1997\\_Liberia\\_Election\\_Final\\_Results.pdf](http://www.ifes.org/-/media/Files/Publications/Election%20Results%20Evaluation%20of/1997/835/1997_Liberia_Election_Final_Results.pdf).
243. Ojielo, op. cit. n. 233 at 4-5.
244. Ojielo, op. cit. n.233 at 5.
245. TRC Final Report Vol. 2 at 168.
246. A copy of the agreement has been made available by the United States Institute for Peace at [http://www.usip.org/sites/default/files/file/resources/collections/peace\\_agreements/liberia\\_08182003.pdf](http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/liberia_08182003.pdf).

247. *Ibid.* at Article XIII.
248. See e.g., Jalloh and Marong, *op. cit.* n.260.
249. TRC Final Report Vol. 1.
250. TRC Final Report Vol. 3 Appendices Title I.
251. TRC Final Report Vol. 3 Appendices Title II.
252. TRC Final Report Vol. 3 Appendices Title III; TRC Final Report Vol. 2.
253. TRC Final Report Vol. 2 at 349. More broadly, see TRC Final Report Vol 2 at para. 12.0 (discussing 'Recommendations on Accountability: Extraordinary Criminal Court').
254. TRC Final Report Vol. 2 at 349–52.
255. TRC Final Report, Annex 2, Draft Statute Establishing The Extraordinary Criminal Court For Liberia.
256. *Ibid.* at Article 3.
257. Ojielo, *op. cit.* n.233 at 6–7.
258. Ojielo, *op. cit.* n.233 at 7.
259. See e.g., Human Rights Watch, 1009, 'Liberia: a human rights disaster – violations of the laws of war by all parties to the conflict', 26 October, available at <http://www.hrw.org/sites/default/files/reports/liberia1990.pdf>, accessed 27 July 2014.
260. Charles Jalloh and Alhagi Marong, 2005, 'Ending impunity: the case for war crimes trials in Liberia', *African Journal of Legal Studies* 1, p. 74.
261. Rome Statute, Article 6.
262. Rome Statute, Article 7.
263. Rome Statute, Article 8.
264. Rome Statute, Articles 122, 123 (actual definition of 'aggression' as a crime – at international law is to be made by subsequent approval of the Assembly of States Party).
265. Jalloh and Marong, *op. cit.* n.260 at 73.
266. Jalloh and Marong, *op. cit.* n.260 at 75.